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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964 — 1965

No. 1067

THE HONORABLE EDWARD SMALL,
CIRCUIT JUDGE,
Petitioner,
vs.
FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

CASE NO. _____

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE

Petitioner,

vs.

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Petitioner, the Honorable Richard Kelly, Circuit Judge, prays that a Writ of Certiorari issue to review the opinion and judgment of the Supreme Court of Florida entered in these proceedings on June 17, 1970.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, which is reported at 238 So.2d 565, appears in Appendix "A" appended hereto at pages 13-40. The opinion or report

of the Judicial Qualifications Commission is unreported and appears in the separately bound Appendix "B" filed herewith at pages 11-23.

JURISDICTION

The opinion of the Supreme Court of Florida was entered on June 17, 1970. A timely Petition for Rehearing was denied on September 14, 1970, and this Petition for Certiorari was filed within ninety days of that date. The Order Denying Petition for Rehearing appears in Appendix "A" appended hereto at page 41. This Court's jurisdiction is invoked under 28 USC §1257(3).

QUESTIONS PRESENTED FOR REVIEW

The primary questions presented are:

I

WHETHER THE PROCEEDINGS BROUGHT BY THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION, THE RECOMMENDATIONS OF THAT COMMISSION, AND THE ACTION OF THE SUPREME COURT OF FLORIDA IN PUBLICLY REPRIMANDING PETITIONER FOR PUBLICATION OF A PETITION RECOMMENDING REFORMS IN THE ADMINISTRATION OF THE COURTS IN HIS JUDICIAL CIRCUIT ABRIDGE PETITIONER'S FREEDOM OF SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II

WHETHER ARTICLE V, SECTION 17A(3) OF THE FLORIDA CONSTITUTION, AS CONSTRUED AND APPLIED SO AS TO ALLOW THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION TO COMBINE THE FUNCTIONS OF INVESTIGATOR, GRAND JURY, PROSECUTOR, AND JUDGE AND JURY OF FACTS AND LAW, IS INVALID UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT IT DENIES TO PETITIONER DUE PROCESS OF LAW.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Constitution of the United States, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States, Amendment XIV §1:

". . .nor shall any state deprive any person of life, liberty or property without due process of law. . ."

Florida Constitution, Article V § 17A(3):

". . .After such investigation as it deems necessary, the judicial qualifications commission may conduct a hearing concerning the removal, discipline or re-

tirement of a justice or judge. . .If after hearing. . . the commission finds good cause therefor, it shall recommend to the supreme court the removal, discipline or retirement of the justice or judge. . ."[1]

Florida Judicial Qualifications Commission Rules Nos. 8, 9, 11, 12, 21, 22, and 23 (published at 207 So.2d 443)[2]

STATEMENT OF THE CASE

Petitioner, the Honorable Richard Kelly, is a judge of the Sixth Judicial Circuit of the State of Florida and is a resident of Pasco County, Florida. Judge Kelly was first elected a circuit judge in November, 1960 and was re-elected to a second successive term in the general election of November, 1966.[3] In 1963 Judge Kelly was the subject of impeachment proceedings before the Florida Legislature; after the prosecution completed its case the Senate dismissed the charges and acquitted the judge without any defense being necessary.

In February, 1968, Judge Kelly was elected presiding judge of the Sixth Judicial Circuit. Between the time of his election and March 19, 1968, Judge Kelly made certain suggestions and sought to institute certain proposals relative to the administration of the coorts in the Sixth Judicial Circuit. On March 19, 1968, Judge

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[1] The complete text of Article V §17A, Florida Constitution is set forth in Appendix "B" filed herewith at pages 43-46.

[2] The pertinent text of the aforesnid rules is set forth in Appendix "B" filed herewith at pages 46-50.

[3] In Florida, the Circuit Court is the highest court of general jurisdiction.

Kelly was notified of the determination of a majority of the other judges in the Circuit that Judge Kelly be removed or recalled as presiding judge. Judge Kelly thereafter announced his resignation as presiding judge. (B 50-52)[4]

On April 5, 1968, Judge Kelly filed with the Clerk of the Sixth Judicial Circuit in Pinellas County, Florida, a Petition addressed to the judges of the Sixth Judicial Circuit. (A 1-12)[5] In his petition he sought to explain to the public why he had resigned as presiding judge and set forth a description of conditions that had and did exist and as a solution recommended certain administrative reforms.

In June, 1968, the Florida Judicial Qualifications Commission (hereinafter referred to as the Commission) notified Judge Kelly that it was undertaking to investigate Judge Kelly's conduct in publishing the aforesaid Petition to determine if Judge Kelly's conduct may have been "conduct unbecoming a member of the judiciary." (B 1) The Commission advised Judge Kelly that it would meet in Pasco County. Subsequently, the Commission again notified Judge Kelly of its continuing investigation and of its intention to meet for a second time in Pasco County. (B 52-53) During this investigation by the Commission, the witnesses who later testified at the trial, were interrogated under oath by the Commission in Judge Kelly's asence; and in November, 1968, the Commission filed formal charges against Judge Kelly. (B 2-4) In response to these formal charges, Judge Kelly filed a Motion to Dismiss the charges on

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[4] "(B)" refers to separately bound Appendix "B" filed herewith.

[5] "(A)" refers to Appendix "A" appended hereto.

the grounds, among others, that the Commission was without jurisdiction over Judge Kelly in that its rules and conduct violated Judge Kelly's constitutional right to freedom of speech under the First and Fourteenth Amendments to the Constitution of the United States and further violated Judge Kelly's right to be afforded due process of law under the Fourteenth Amendment to the Constitution of the United States. (B 5-7) The Commission, on its own initiative, then entered an Order striking Judge Kelly's Motion to Dismiss on the ground that the rules of the Commission do not provide for the filing of such Motions. (B 7)

Judge Kelly then filed an Answer to the charges and raised in the Sixth Defense of said Answer the constitutional infirmities previously raised by means of his Motion to Dismiss, that is, the violation of his right to freedom of speech and his right to be afforded due process of law. (B 8-10)

In January 1969 and in March 1969, the Commission conducted hearings at which its designated counsel served as attorney for the Commission and the Commission itself acted as trier of fact and adjudicator of the law. The hearings were held for the purpose of inquiring into the charges filed by the Commission against Judge Kelly. At the hearings, Judge Kelly was represented by counsel who were allowed to present evidence and cross examine the witnesses produced by the Commission and its attorneys.

On May 7, 1969, the Commission filed with the Supreme Court of Florida its report, including background, findings of fact, conclusions and recommendations. (B-11-23) The Commission found that there was sufficient evidence to support specific allegations relating

to the charge against Judge Kelly of conduct unbecoming a member of the judiciary. The findings of the Commission with respect to this charge were based solely on the Commission's conclusions as to Judge Kelly's method and motive in filing his Petition with the Clerk of the Circuit Court. Having found and concluded that Judge Kelly's filing of the Petition constituted conduct unbecoming a member of the judiciary, the Commission recommended to the Supreme Court that Judge Kelly be publicly reprimanded for such conduct and that he be admonished, among other things, to cooperate with his fellow judges, follow the normal method for seeking procedural changes as to the administration of justice, and refrain from seeking personal publicity or attempting to advance his personal ambitions through the public information media. (B 21) The Commission also recommended that Judge Kelly restrict his duties to Pasco County and refrain from service in Pinellas County, both of which comprise the Sixth Judicial Circuit. The Commission further recommended that the entire record of the inquiry may be introduced into evidence in any subsequent inquiry which may be brought before the Commission concerning Judge Kelly.

Judge Kelly filed a timely Petition with the Supreme Court of Florida seeking to have the Supreme Court reject the recommendations, findings and conclusions of the Commission. (B 24-34) In his Petition to the Supreme Court, Judge Kelly urged that:

> "2.D. The procedure by which Petitioner was investigated, tried and adjudged by the Commission violated the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. . ." (B 31)

"3. Respondent [Judge Kelly] has been denied due process of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States. . .in that:

'(a) The Commission was apprised of all facets and features of the investigation of petitioner prior to the hearing upon the merits of the charges against petitioner.

(b) The Commission itself filed the accusation against petitioner.

(c) The Commission was the prosecutor of the charges against petitioner.

(d) The Commission was the adjudicator of all questions of evidence, fact and law at the hearing on the merits of the charges against petitioner.'" (B 32)

The Supreme Court of Florida thereafter entered its opinion, dated June 17, 1970. (A 13-40) The majority opinion of the Supreme Court of Florida (representing the view of four of the justices) approved and accepted the recommendations of the Commission except for the suggested restriction of Judge Kelly to Pasco County. The majority of the Supreme Court held that Judge Kelly had engaged in conduct unbecoming a member of the judiciary and publicly reprimanded Judge Kelly for such conduct. In issuing its reprimand, the majority of the Court stated (A 22):

"The reprimand does not amount to an acquittal, nor does it have the elements of a final judgment necessary to invoke the principles of res judicata."

The majority of the Court indicated that the entire record of the inquiry might be introduced into evidence in any subsequent inquiry brought before the Commission concerning Judge Kelly. (A 40) The majority of the Court specifically rejected the free speech and due process points raised on behalf of Judge Kelly. (A 18-20, 22-23)

Three members of the Florida Supreme Court dissented from the majority opinion. Chief Justice Richard W. Ervin wrote a dissenting opinion in which two associate justices concurred. The dissenting opinion recognizes primarily that the action of the Commission and the public reprimand by the majority of the Supreme Court of Florida impinge upon Judge Kelly's right to freedom of speech guaranteed by the First and Fourteenth Amendments to the Constitution of the United States. Chief Justice Ervin stated (A 36):

> "If the First Amendment does not protect a Judge's right to speak in circumstances such as these, then we are bound to have in Florida a timorous lot of judges lacking independence, afraid of their judicial shadows and fearful to exercise conscientiously the right to speak out in favor of judicial reform."

Judge Kelly filed a timely Petition for Rehearing addressed to the majority opinion of the Supreme Court of Florida and there once more raised the question of Judge Kelly's constitutionally protected rights to freedom of speech. (B 35-43) The Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

I

The public reprimand of Petitioner by the Supreme Court of Florida for publication of a Petition criticizing the administration of the courts in his judicial circuit conflicts with free speech principles enunciated in previous decisions of this Court.

The charges against Judge Kelly which constituted the "conduct unbecoming a member of the judiciary", according to the Commission, included (1) failing to cooperate with other circuit judges, (2) attempting to seek alleged change in court procedures in a manner contrary to certain canons of judicial ethics, (3) seeking publicity with the intent to embarrass other judges by filing a Petition with the Clerk of the Circuit Court, (4) using the office of Circuit Judge for the purpose of advancing personal ambitions and publicity to the detriment or embarrassment of fellow judges and (5) conduct leading to the disrespect for, and the lowering of, the image of the Court. (B 2-4) Review of the full report of the Commission together with the opinion of the Supreme Court of Florida indicates quite clearly that the *sine qua non* of the charges against Judge Kelly was his filing, with the Clerk of the Circuit Court, the Petition criticizing the administration of the courts in his circuit and recommending reforms believed by Judge Kelly to be in the best interest of the Circuit and the people. The majority opinion of the Supreme Court of Florida recognizes this fact by stating (A 27):

> "The crucial question is whether the activities of Petitioner [Judge Kelly] were for the purpose of effecting court reform or for the purpose of securing personal notoriety and furthering a career in politics."

The "activities" referred to by the majority of the Supreme Court relate exclusively to Judge Kelly's Petition.

In an attempt to avoid the unconstitutional consequences of its decision, the majority of the Supreme Court ostensibly denounced Judge Kelly's motive[6] and

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[6] Judge Kelly's motive in filing his Petition is most graphically illustrated by his testimony before the Commission as follows (Transcript of Proceedings before Florida Judicial Qualifications Commission, held March 13, 1980, pages 1432-1433):

Q Was it your dedication that sort of forced you to do this?

A The answer to that sounds somewhat self-serving. But I think it was my dedication, and it was dedication to this type of situation: When these people are in the County Jail over there, and I know that there is a popular sentiment across the country to be hard on crime, but the facts of life are that virtually all of the people that are in that County Jail right now will be either turned loose without being prosecuted, they will be prosecuted and released on probation, or they will serve a very short term and be released either from the County Jail or from a penitentiary. Then these people are going to go forth, and we have got to live with them. The way they are treated there I think is important and vital. Now, for those people that are going to be released without prosecution, and I have records here to show that the number is very substantial, or if they are placed on probation, you are going to find that virtually all of these people are poor, hard-poor people. Now, if you turn them loose on probation 90 days or 120 days or six months after they have been charged, then they have lost their car and their refrigerator, and they are in debt with the finance company and paying horrendous interest rates, and they have lost their wife and family, and their life is in an absolute utter chaos. They are poor, uneducated, and poorly trained. And we put them out and say live in society in peace. This is a very difficult situation. So as far as I am concerned I am uneasy and chafed and prodded by every day they stay there when they shouldn't be there. If we are going to put them on probation, then let's find out and get the job done. And this hurts me and it bothers me. And I don't mind paying this price to accomplish that.

methods rather than his right to criticize. (A 21) However, the curtailment of Judge Kelly's freedom of speech is no less severe simply because this result is achieved through indirection.

The Commission and the majority of the Supreme Court of Florida have disciplined Judge Kelly by publicly reprimanding him for his criticism of the courts and they have publicly warned Judge Kelly that he may be removed from office if he persists in his criticism. The disciplinary measures taken by the Commission and the majority of the Supreme Court are clearly inconsistent with the principle established by this Court that public criticism of the courts must create a clear and present danger of disrupting the administration of justice for punishment of the critic to be constitutionally permitted. See *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed. 2d 569 (1962); *Craig v. Harney*, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1946); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1945); *Bridges v. California*, 314 U.S. 252 62 S.Ct. 190, 86 L.Ed. 192 (1941) Cf. *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed. 2d 125 (1964). Embarrassment of other judges, as allegedly resulted from Judge Kelly's criticism, is certainly not such a disruption of the administration of justice which would warrant the infringement of Judge Kelly's right to criticize.

Judge Kelly is a public official twice elected by the voters in his circuit. In his Petition directed to the other judges of his circuit, Judge Kelly recognized that:

> "The substance of our judicial responsibility is to dispense justice according to law and provide an efficient court that is responsive to the public's need." (A 2)

Each and every one of the proposals set forth by Judge Kelly in his Petition is designed to promote more efficient and effective administration of the courts. It is not merely the right of a public official to espouse such changes but indeed it is his duty. The public's right to know and receive information is an integral part of the freedom of speech that Judge Kelly is here seeking to protect. Cf., *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968).

This Court has held that the right of a public official to criticize is no less constitutionally protected because of his official capacity. See *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d 811 (1968); *Puentes v. Board of Education*, 392 U.S. 653, 88A S.Ct. 2271 (1968). Significantly, in *Pickering v. Board of Education, supra*, this Court recognized that teachers, as a class, are the members of a community most likely to have informed and definite opinions as to the administration and operation of the schools and that, accordingly, "it is essential that they be able to speak out freely on such questions without fear of retalitory dismissal." (391 U.S. at 572) In the same way, judges, as a class, are the members of a community most likely to have informed and definite opinions as to the

administration and operation of the courts. Therefore, it is just as essential that they be able to speak out freely on such questions without fear of public reprimand or retalintory dismissal.[7]

According to the majority of the Supreme Court of Florida, Judge Kelly and members of the judiciary in general are constantly "enmeshed in the conflict between candor and responsibility—maintaining the candor of the politician without shirking the responsibilities of a judge." (A 27) Further, the majority of the Supreme Court of Florida found as follows:

> "The candor of Petitioner [Judge Kelly] as a politician resulted in a large group of dedicated followers, but, in the final analysis, his candor as a politician caused him to shirk his responsibilities as a member of the judiciary." (A 28)

Thus, Judge Kelley stands accused, convicted and censured for being candid, for speaking out, for refusing to be timid.

It is in this context that we respectfully recall to this Honorable Court a recent statement delivered at the annual meeting of the American Bar Association in St. Louis, Missouri, on October 10, 1970. In discussing certain problems with the federal judicial system, Mr. Chief Justice Warren E. Burger stated:

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[7] The fact that Judge Kelly has not yet been removed from office but has, at this point, only been reprimanded and warned does not make the protection of the First and Fourteenth Amendments premature. Because the threat of sanctions may deter almost as potently as the actual application of sanctions, this Court has treated a threatened loss of public employment as if it were actual. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967); *Elfbrandt* v. *Russell*, 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed. 2d 321 (1965).

> "The price we are paying and will pay is partly because judges heve been too timid and the bar has been too apathetic to make clear to the public and the Congress the needs of the courts. I intend to be neither timid nor apathetic about this." U.S. News and World Report, August 24, 1970, page 70.

Timidity and apathy are especially costly in this regard in Florida because the judges are elected and the franchise of the individual is valueless unless he has free access to information concerning the Courts. Recognizing this Judge Kelly has been neither timid nor apathetic.[a] It

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[a] Judge Kelly's sense of duty in this regard is revelaed during his cross-examination by one of the members of the Commission (Transcript of Proceedings before Florida Judicial Qualifications Commission, held March 13, 1969, pages 1438-1441):

Q In connection with this, do you think that you can go along with these rules, whatever they might be, and recognize the fact that in this country of ours we must, if the courts are going to operate, we have got to accept the rule of the majority?

A Yes, Judge Moody, I understand that. But there are some very difficult problems in this. And just to say yes to that I think doesn't countenance all these problems. For instance, in the final analysis *the public has to make some decisions in this thing, and if they don't know what the issues are they can't intelligently exercise a franchise.* And then we get into this question about image. I know that this is bad news for me to say that. But I can't believe that telling the truth is going to be harmful in the end to what I want to serve. And that is this: This conversation about the image of the court is inconsistent with what I believe is appropriate. The reality of the court. (Emphasis added)

Q I believe you are getting away from the question that I asked you.

A Well, Judge Moody, what I was trying to aim at is this. You asked should a majority rule. Yes, I believe that. And I think that if your question was should the majority of the Judges rule within the Circuits, yes, I think that they should. But I did not want, in order to curry favor with you, to be unfair or deceitful about it.

is this very circumstance which cries out for this Court to reaffirm the free speech principles enunciated in the decisions mentioned hereinabove by issuing a Writ of

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Q I don't want you to curry favor. I am trying to get at your basic concepts.

A I wasn't suggesting you did.

Q It is a problem. We live under the law. We must. We must abide by the law. We must abide by our rules.

A Yes.

Q We can't change the law by violent means.
A Yes, sir.

Q We should change the law in the recognized method of changing the law.

A Yes.

Q We, as Judges, have that primary obligation, and it is under that thought I was asking whether or not you felt that you could comply with the rules and try to change them in an orderly manner if you disagree with them, and under the prescribed manner of change, rather than a manner that shall we say would be in violation of the Canons of Ethics.

A Judge Moody, let me say this. I have no business violating the Canons of Ethics. There is no justification for that. And I have no refuge from the law if I do. There is no question about that. And I recognize the validity of that and the responsibility. But I am not real sure that there is anything well defined which says that for a Judge to file with the clerk of his court what he thinks a problem is and the solution for it when you consider this. In your Circuit you have a dismissal procedure and it has been in existence I think for ten years or more than 15 years, I don't know, but I know for a long time. In my Circuit when I came here we had no rules. There were more than 9,000 cases in Pinellas County. There were 2,000 cases pending in this County. And yet the clerk was representing to the public that there were only 300 pending. There 135 appeals pending. Fifty-two of them had been pending more than 20 years. Now, I think these are vital things, and vital to the public. And the issue is this: If an individual Judge tries to unilaterally try to do something about this in a conservative way after long

Certiorari to the Supreme Court of Florida so that judges all over the United States, as well as Judge Kelly, will be protected in their right and duty to inform the public regarding the needs of the Courts and so that the public's right to receive informed information will remain unfettered.

II

The combination of the Commission's functions as investigator, grand jury, prosecutor, and judge and jury of facts and law directly conflicts with procedural due process principles previously established by this Court.

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urgings to his brothers, if the question is must he then simply capitulate and let it go on and draw his salary, it is a hard question for me. It is very difficult for me as an individual — now, I don't file petitions every day. I have been on the Bench for more than eight years and I filed three petitions. I think they were all justified. And I have tried to rectify these things. And I think this is good for the Judges. I think that it serves the image of the court that I want to serve, and I am not trying to cause trouble. But I am concerned about these matters.

Q Well, don't misunderstand me, Judge Kelly. I think we all are concerned from time to time. As a matter of fact, I have a matter before me right now involving the situation where the State, at the request of the U. S. District Attorney's office, has granted blanket immunity to criminals. I think it is wrong. It is a matter that I know as a Judge I have to handle in a certain manner, and I can't run to the press with it. But we have obligations, as I see it, as Judges, do we not, to comply with our rules and handle them in a manner that is recognized, a recognized custom and recognized by the rules, in trying to handle the matter in the best interests of everyone?

A Yes, sir. And there can't be any question about that. But, when individual constitutional rights are being violated every day, every day in this Circuit, I can't help but feel it is important to do something about it. I think that I should be punished. There is no question about that. But I should be punished for the things that I have not done in the years that I have let go by and not doing them more than for filing this Petition.

Although Article V, Section 17A(3) of the Florida Constitution provides that the Commission may request the appointment of special referees "to hear and to take evidence . . . and to report thereon to the Commission," in the instant case the Commission chose to perform this function itself. (B 45) Thus, it was the Commission which decided to, and did, investigate the conduct of Judge Kelly. It was the Commission which then filed formal charges against Judge Kelly. It was the Commission, through its designated counsel, which prosecuted Judge Kelly. It was the Commission which heard and took evidence relative to these charges. It was the Commission which then made findings of fact, conclusions and recommendations to the Supreme Court of Florida. It was the Commission, again through its designated counsel, which briefed and argued facts and law allegedly in support of its position before the Supreme Court of Florida. And, presumably, it will be the Commission again, through its designated counsel, which will before this Court, attempt to uphold the decision of the majority of the Supreme Court of Florida.

In *In re Murchinson*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), this Court indicated that a mixing of functions of grand jury and judge is a denial of due process. This Court condemned a procedure under which a single judge acted first as a grand jury and then tried the criminal contempt proceedings arising out of his investigation as grand jury. This Court stated:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigation." (349 U.S. at 137, 75 S. St. at 625)

Also in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 9 L.Ed. 616 (1950), this Court, addressing itself to the purposes for enactment of the Federal Administrative Procedure Act, stated (339 U.S. at 41, 94 L.Ed. at 625):

> "More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."

See also *American Cynamid Company* v. *F.T.C.* 363 F.2d 757 (6th Cir. 1966); *Amos Treat and Company, Inc.* v. *Securities Exchange Commission*, 306 F.2d 260 (D.C. Cir. 1962); *Mack* v. *Florida State Board of Dentistry*, 396 F.Supp. 1959 (S.D. Fla. 1969).

The due process prohibition against mixing of functions should apply to the instant proceedings. This Court has held that requirements of procedural due process must be met in disbarment proceedings, which are quasi-criminal in nature. See *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *Spevack* v. *Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). These proceedings, which can lead to removal of a judge from office, are no less "penal" than disbarment proceedings.

The natural compulsion upon the Commission to justify its finding of probable cause for holding hearings and the natural inclination of the Commission to be persuaded by its designated counsel have necessarily prevented impartial findings, conclusions and recommendations on the part of the Commission. Although

it is true that the Commission can only recommend and the Supreme Court of Florida is not bound by any of the recommendations of the Commission, the Supreme Court of Florida does not take additional evidence and the majority opinion of the Supreme Court itself recognizes the significance of the Commission's recommendations. The majority opinion states (A 23-24):

> "While the power to render the ultimate judgment in these cases is vested in this Court, the findings and recommendations of the Florida Judicial Qualifications Commission are entitled to receive due consideration and are of persuasive force. . . . In view of these constitutional provisions prescribing the composition of the Commission, its findings should be given great weight."

We would respectfully submit that giving great weight to the findings and recommendations of the Commission in the instant case results in a denial of due process to Judge Kelly.

CONCLUSION

The development of modern machinery for inquiring into judicial conduct is a vital part of our contemporary legal history. Errant judicial conduct should be dealt with promptly. Yet, whatever system is used, judges must receive the same basic fairness expected of them. Instrumentalities such as the Florida Judicial Qualifications Commission may be a wholesome concept. But they must not be allowed to assume the role of censors or to stifle constructive criticism of judicial administration. It is timely and urgent that this Court furnish its guidance with regard to the critical constitutional aspects of these developments.

Judge Kelly sought to inform the public of his views on the need for reform and change in judicial administration in Florida's Sixth Judicial Circuit. He did so through the filing of a public document which was thoughful and respectful and which constituted a heartfelt act of conscience by a judge in the performance of his duty. Without hesitation, we urge this Court to read that document (Appendix "A", pages 1-12) in its entirety with a view to determining whether such public comment may constitutionally serve as the basis for adverse disciplinary action against a judge; or whether the sanctions imposed here may constitutionally stand as a muzzle against similar public comment by judges in Florida or any other state.

We submit that the vital needs of a free society, where the free flow of information from informed sources is imperative, cannot accommodate the stifling effect of the opinion sought to be reviewed.

For these reasons, a writ of certiorari should issue to review the action and opinion of the majority of the Supreme Court of Florida.

Respectfully submitted,

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APPENDIX "A"

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF FLORIDA

PETITION TO THE JUDGES OF THE SIXTH JUDICIAL CIRCUIT

Comes now the undersigned as Judge of the Sixth Judicial Circuit and submits to his fellow judges for their approval a set of administrative reforms for the purpose of causing this Court to render a more efficient and direct service to the public.

On the 26th day of March, 1968, the Petitioner resigned as Presiding Judge of this circuit. Such an event deserves more explanation than was contained in the written resignation. The need for administration of the business of this circuit is urgent and this aspect of the Court's responsibility has been largely neglected. Your Petitioner has consistently and conservatively urged this view. The reforms presented by this Petitioner have always been sought in the privacy of judicial conferences and individual discussions with the judges of this circuit. Precipitous action by this Petitioner in bringing about the accomplished reforms has occurred only when it was made apparent that the alternatives were unilateral action or abandonment of a cause necessary in the interest of the Court and the public we serve.

It is not intended that a rehash of past debates be had in this text but it is clear that reference to these matters is necessary in order that the present situation be made clear.

Attached is a petition filed the 7th day of September, 1962, a consideration of which is pertinent to present understanding. (Exhibit A)

This reference clearly indicates that what has been suggested by this Petitioner has in the past proven to be reasonable, conservative and in the best interest of this Court and eventually adopted. This establishes that

the present response is not new but is old. It became apparent that this Petitioner as Presiding Judge was faced with a need for expending considerable energy to maintain his position as Presiding Judge which is really irrelevant. The substance of our judicial responsibility is to dispense justice according to law and provide an efficient court that is responsive to the public's need. Who is Presiding Judge is unimportant.

Nothing that is said here should indicate that this Petitioner is the only Judge in the circuit that is concerned with the present condition and direction of the courts in Pinellas County. This very presentation is an expression of confidence that even the most militant objector can be stimulated to share this concern. Some of the judges presently agree that changes should be made but not necessarily in complete agreement with the proposals here made.

Basically the objection to any kind of administrative improvement has been found primarily with the concern that change constitutes a criticism of those who have not acted in the past and have failed to make improvements in the present and that any change is an indictment of their inertia. This is unfortunately negative and unwarranted because such a result is more than compensated for by the positive appreciation for present accomplishment. The public is logically entitled to hope for evolution and progress in every governmental function.

The judges of this circuit know all or most of what is here to be suggested. The conditions, however, cause a need for a record and the responsibility fixed.

A comparison of the cases completed and disposed of in Pinellas County with Pasco County, the other county in the circuit, and with Hillsborough County which constitutes the Thirteenth Judicial Circuit and is well suited for comparison, reveals that from 1963 through 1966' the production of the court in Pinellas County and

the Sixth Circuit in terms of work completed was substantially less for every year of comparison than the work accomplished in Hillsborough County. (See attached Exhibit B)

A comparison of the work load and condition of the Circuit Court in Pinellas and Pasco County[2] shows that Pinellas has a case load ten times greater than Pasco County. It has eleven times as many judges and thirty times as many cases pending. It is also significant to note that at the beginning of 1967, Pinellas County had 7,110 cases pending before its Circuit Court and that at the close of the year there were 7,454 cases, which shows a trend in the wrong direction.[3] While in Pasco County at the beginning of 1967, there were 303 cases pending before the Circuit Court and at the close of the year there were 273 cases, which shows a change of ten per cent in the right direction.[4]

The records[5] show that for the year 1967 the Circuit Judges of Pinellas County assigned twenty-five per cent of the cases disposed of to general masters causing an additional and unnecessary annual cost to the litigants of $24,060.00. Besides the additional cost, this procedure imposes a seven to ten day delay in the disposition of the case compared to a procedure where a judge tends to the case himself. These cases being heard by the judges could and should result in additional savings of thousands of dollars in unnecessary transcription and court reporter fees. This suggestion will not be popular because it will interfere with a source of income of the court reporters of this circuit; however, this is a much more acceptable alternative than make work inefficiency.

In August of 1965 there were 139 prisoners being held in the Pinellas County jail awaiting action by the Circuit Court. Attention was focused on this situation by the Petitioner in September of 1965, and by September of 1966 this number had been reduced to 52. A year later the number had risen to 93 and by March of 1968,

the number of prisoners awaiting action by the Circuit Court had increased to 123. It is apparent that with the increase in the county's population, the crime rate and the efficiency of law enforcement that the number of people waiting in jail for action by the Court would naturally increase. It is submitted, however, that the phenomenal increase from September, 1966, to March, 1968, is more evidence of need for administrative change than an alarming increase in the crime rate.

The tremendous reduction in the number of prisoners between September, 1965, and September, 1966, is an excellent case in point for the purpose of showing the gross lack of administration of the Circuit Court in Pinellas County and the serious consequences of a poorly administered court. The change was accomplished with the simple expediency of appointing the Public Defender at an early date, and yet to bring this simple administrative change into effect resulted unreasonably in crisis, controversy and ill-will among the judges which varied only in degree from the same response that has met every other suggestion to improve administration.

Soon after the undersigned took office in 1961, he started urging that the procedure for expediting criminal cases, especially cases in which the defendant was being held in jail, be reviewed. Years went by and nothing was done in Pinellas County; then in 1965, your Petitioner went to the then Criminal Administrator for Pinellas County and requested the reform and argued its urgency. The rejection was unqualified. During the same time a grand jury was convened in Clearwater, empaneled by the Criminal Administrator and although it is the duty of a judge presiding over a grand jury to instruct the grand jurors on their duties,[6] no instruction was given regarding Section 905.16[7] of the Florida Statutes. (See Exhibit C) This provision in the law makes it the duty of the grand jury to inquire into every case in which a citizen is being held and against whom no indictment or information (formal charge) has been filed, the purpose being to use the grand jury for protecting

citizens from being held for extended periods of time without prompt prosecution and to avoid the very situation that existed in the Pinellas County jails.

As a result this Petitioner arranged for a conference of the judges of the circuit at which he reminded the judges of his long standing requests that something be done, presented a transcript of the Criminal Administrator's charge to the jury, and a jail list prepared by the Sheriff of Pinellas County. The response was *controversy*, personal attacks and the Petitioner reminded that he was a trouble maker. In spite of this your Petitioner made the proposition to his fellow judges that either they were going to take action "now" or the Petitioner would "empanel a grand jury and sit in Clearwater with the grand jury until the jail is as clean as a hound's tooth as the letter and spirit of the law requires." This resulted in the Criminal Administrator resigning with a statement that if he could not "run the job my way I won't run it." This Petitioner personally urged him not to resign saying," the responsibility belongs to all of us, we just need to make some changes." The change was effected and within one year the number of prisoners in the Pinellas County jail awaiting action by the Circuit Court was greatly reduced. This is another good example of a typical episode in the Sixth Judicial Circuit and it goes a long way to explain the present condition.

This reform was necessary to guarantee the protection afforded the public by the Constitution but it was also necessitated by the fact that a new jail just constructed at a tremendous public expense was already overcrowded and great sums of public money were being wasted.

Virtually every phase of the criminal administration at the present time is burdened with inefficiency. An excellent example of this is the large number of persons held in custody being transported to the various Justice of the Peace Courts in St. Petersburg, Tarpon

Springs, and other areas of the county from the county jail in Clearwater for the purpose of an insolvency hearing then transported back to the county jail to be returned at a later date for a preliminary hearing, all of this at a gross and unnecessary expense to the taxpayers and at unnecessary risk to the guards charged with the responsibility of this unwarranted prisoner transportation.

The county prisoners most often are in the county jail in Clearwater at one end of a passageway which runs from the county jail to the courthouse with several Circuit Judges at the other end. This passageway is grated with heavy fencing at a great public expense for security purposes. All that would be required would be for the prisoners to be taken through this passageway to a Circuit Judge so lawyers could be appointed for those who qualify. This would result in the prisoner making one trip in most instances to the Justice of the Peace Court instead of two or three trips. This simple effort would save thousands of dollars a year. This suggestion is not a criticism of the Justices of the Peace but deals with the lack of sensitivity on the part of the Circuit Court to the needs of administration in expediting the business of the courts efficiently and economically.

The records of the Circuit Court for Pinellas County show that six judges scheduled 38 cases for trial during the week of October 9, 1967. If these same trials had been scheduled before only three judges, the 38 cases could have been tried with four court days to spare. Scheduling these cases before the six judges required six courtrooms, six or more bailiffs, six deputy clerks, six court reporters, six jury panels or time consuming and confusing panel sharing, and the scheduling of the time of six judges while one-half of this force could have done the same work in the same time with four days to spare. (See Exhibit D)

This same comparison for the whole month of October shows that nineteen trial weeks were scheduled

while only nine were required with the result that hundreds of hours of judges time and thousands of taxpayers dollars were wasted. These same comparisons for the last quarter of 1967 and the first two months of 1968 reveal that 1,360 hours of judges time was largely lost along with gross waste of jurors time and the time of clerks, bailiffs, court reporters and public money.

During the time that this writer served as Presiding Judge it was quite apparent that all of the Pinellas County officials that would be involved in necessary court reforms, including the State Attorney, the Public Defender, the Sheriff and other law enforcement officials, the Clerk of the Court, and the Board of County Commissioners for Pinellas County were eager to bring more efficient administration to the Circuit Court for Pinellas County. Their cooperation was responsive and real and greatly appreciated. The previous lack of communication was manifest in every procedure and regard and is evidence of inattention on the part of the judges upon whom the other officials necessarily look for leadership.

The Board of County Commissioners for Pinellas County has expressed its concern about the mounting cost of operating the courts. This concern is justified and applauded. Every dollar added to the cost of litigation whether paid directly by the litigants or the taxpayers is a negative in determining the efficiency of our trial court system.

Vast and important and much needed judicial reforms await only the interest and action by the judges of this circuit.

It is not intended that this petition constitute an in depth study or report on reorganizing and reforming this circuit. It is intended to bring attention to the glaring problems and demonstrate obvious solutions. The detection of more need and the suggestion of more clever remedy is readily available if this prod creates concern and action.

Good administration will result in better courts run for less giving better service and leave the judges with free time to take up additional tasks and further lessen the tax burden.

Efficient administration in this circuit is clearly going to mean that the judges will not have enough work to do and more jurisdiction is required in order to more effectively utilize their time. The Civil and Criminal Court of Record in Pinellas County is continuing to grow. It started with one judge, it now has two and in the normal course it will soon grow to three. In good conscience, the circuit judges can not avoid taking this additional jurisdiction enabling the Civil and Criminal Court of Record to be abolished and the cost of that court which amounts to thousands of dollars to be saved. An orderly and efficient acquisition of the Civil and Criminal Court of Record jurisdiction would demand that the two present Court of Record judges be made Circuit Judges at the time of the transition. This would assure a smooth transfer by causing two extremely experienced and qualified judges familiar with the cases and calendar to be present to assist in the task.

It can be anticipated that under the present population criteria provided in the Constitution, one new judge will be added in this circuit each year. Taking the two Court of Record judges would mean that another Circuit Judge would not be added until the population had sufficiently increased to justify the addition of these two Court of Record Judges.

Such a plan would contemplate that at the present time the number of judges handling the entire jurisdiction of both courts would not increase and that two years hence when under the present situation two additional Circuit Judges could be added they would *not* be added and this suggestion would pay tremendous dividends to the taxpayers and be a source of accomplishment and pride for every judge in this circuit.

This matter has been discussed with the Court of Record Judges and they believe that the suggestion appears to be sound and are eager to consider the matter further with the judges of this circuit. This suggestion is further recommended by the fact that it would cause the jurisdiction of this court in Pasco and Pinellas to be more uniform.

At the present time the judge acting as Criminal Administrator has a secretary working with him in that capacity and a few doors down the hall has another secretary tending to his other judicial tasks at a salary of $5,000.00. No one familiar with the operation of a judge's office or the duties of his secretary would contend that a Circuit Judge needs two secretaries.

The individual judges should impose additionally upon their secretaries in handling the administration and disposition of criminal cases and thus avoid the luxury of a secretary to the Criminal Administrator or Presiding Judge. Many of the tasks heretofore performed by such person being specified in the Statute as the duty of officials which currently have adequate personnel to handle these matters without additional expenditure. Specific reference is had to such matter as the notification to the bondsmen and the parents of minor defendants. (Section 903.26 and 932.38, Florida Statutes)

We, as Circuit Judges, share an awesome responsibility. This Petitioner has resigned a position he coveted to remove any possibility of personality and vanity as a consideration in the discharging of this obligation. In return it is only requested that these suggestions be considered on their merits and adopted or be substituted for by better plans.

In this vein, the following recommendations are humbly and respectfully submitted in the hope that they will be an improvement or will stimulate thought bringing forth better suggestions.

A. That no more than three judges be assigned for the trial of civil and criminal cases in Pinellas County on any given week until such time as a need for more is shown to exist.

The mechanics of this suggestion may be demonstrated by assuming that there was a need for the trial of civil and criminal cases in a given week in Clearwater and a need for the trial of civil cases in St. Petersburg. All St. Petersburg cases would be assigned to one judge sitting there. All civil cases in Clearwater would be assigned to one judge at that location and all criminal cases assigned to the third judge in Clearwater, all cases to be scheduled on Monday morning. Each judge upon completing the cases scheduled before him would then have an obligation to assist the other judges with the result that each judge would be totally occupied with the trial of cases until all of the cases scheduled for trial that week had been completed.

This suggestion further contemplates that in many weeks the services of only one judge or possibly two would be required to handle all trials, civil or criminal, leaving the other ten or eleven judges free to dispose of and schedule full calendars with ample notice on matters not requiring a jury.

B. That all cases in the Circuit Court be heard by the judges of that court unless there is some particular need suggesting the referral of the cases to a special or general master for hearing. To this end any judge feeling that the burden of his calendar or the cases assigned to him will cause undue delay make this fact known to the Presiding Judge and assistance from the other judges be brought to bear rather than passing the case from the attention of the judges to a hearing before a general or special master at the expense of unnecessary delay and cost to the litigants.

C. That the Public Defender be appointed by the Circuit Judges as a daily routine for all indigent persons qualifying under the law for the services of that office.

D. That pre-sentence investigations be requested of

the probation office by the circuit judge handling the case or the Presiding Judge with the consent of the Defendant in all instances as soon as the Public Defender is aware that his client intends to plead guilty and not wait until an information or indictment is filed and the Defendant arraigned.

E. That the State Attorney be worked with and encouraged by the judges to expedite the disposition of every criminal case, attacking the problem on a step by step basis from the time of arrest until the Defendant is released at liberty or to other authorities, including but not limited to the use of Section 909.14 of the Florida Statutes.

F. That the Public Defender be encouraged and cooperated with in order to permit him to commence at the earliest possible time to develop the information that will enable advice to be given to his client on a plea and to avoid delaying the commencement of this process until an information or indictment has been filed.

G. That the Court, the State Attorney, the Public Defender and representatives of the Bar make a concerted effort to avoid last minute pleas of guilty in cases scheduled for trial.

Suggestions D, E, F and G are directly dependent upon the Circuit Judges providing the communication and coordination. These are especially fertile areas.

H. That the job of secretary to the Criminal Administrator be eliminated.

I. That all orders providing for the payment from public funds for testimony and trial transcripts be limited in amount to that provided by Chapter 29, Florida Statute, and if the law in this regard is inadequate that the Court urge its change upon the legislature when it next convenes.

J. That the Civil and Criminal Court of Record be abolished and the jurisdiction assumed by this Court.

DATED this 3rd day of April, 1968.

Respectfully submitted
RICHARD KELLY
Circuit Judge

FOOTNOTES

[1] As shown by the annual report of the Judicial Council of Florida

[2] Statistical return filed by the Clerk of the Circuit Court in the respective counties to the Judicial Council of Florida for 1967

[3] Statistical return filed by the Clerk of the Circuit Court of Pinellas County to the Judicial Council of Florida for 1967

[4] Statistical return filed by the Clerk of the Circuit Court of Pasco County to the Judicial Council of Florida for 1967

[5] The report referred to in footnote 3 and data furnished by the three general masters for Pinellas County, showing the Honorable George L. Brown, Jr. (465), the Honorable Edwin B. Ellis (585) and the Honorable Richard A. Eagle (554)

[6] Section 905.11, Florida Statutes: CHARGE OF COURT
After the grand jurors are sworn the court shall charge them concerning their *duties*. (emphasis supplied)

[7] 905.16 *DUTIES* OF GRAND JURORS
The grand jurors shall inquire into every offense triable within the county for which any person has been held to answer, if an indictment has not been found or an information filed for such offense, and all other indictable offenses triable within the county which are presented to them by the prosecuting attorney or otherwise come to their knowledge. (emphasis supplied)

EXHIBITS *

A. Petition filed with Clerk of the Circuit Court, Clearwater, September 7, 1962.

B. Comparison chart for Pasco, Pinellas and Hillsborough.

C. Transcript of proceedings before Circuit Court, Clearwater, on the 30th day of August, 1965.

D. Chart showing trial schedules for last quarter of 1967 and first two months of 1968.

* **The Exhibits to Judge Kelly's Petition are set forth in the separately bound Appendix "B" filed herewith at pages 53 through 90**

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1970

INQUIRY CONCERNING A
JUDGE NO. 1
Richard A. Kelly, Circuit Judge : CASE NO. 38,595

Opinion filed June 17, 1970
Case of original jurisdiction—Report from The Florida Judicial Qualifications Commission

Masterson, Lloyd, Sundberg & Rogers and Fowler, White, Collins, Gillen, Humkey & Trenam, for Petitioner

William D. Hopkins and F. E. Steinmeyer, III, for Respondent

Joseph F. McDermott, as Amicus Curiae Committee for Judge Kelly

ADKINS, J.

We have for consideration a petition to reject the recommendations, findings and conclusions of the Florida Judicial Qualifications Commission in its first proceeding. Rule 24(a), Florida Judicial Qualifications Commission Rules (F.J.Q.C.R.). The Commission found petitioner Judge Richard A. Kelly of Dade City, Florida, guilty of certain conduct unbecoming a member of the judiciary.

Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved

by evidence of an accumulation of small and ostensibly innocuous incidents which, when considered together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary. The record in this case clearly reflects a pattern of petitioner's hostility toward many attorneys, court officials, and fellow judges, as well as a concerted effort to pamper the public and news media by press releases designed to bolster his personal image at the expense of the judiciary. This is conduct unbecoming a member of the judiciary.

Petitioner is a judge of the Sixth Judicial Circuit of the State of Florida and a resident of Pasco County. He was first elected a circuit judge in November 1960, and was re-elected to that office in the general election of November 1966.

Petitioner was the subject of impeachment proceedings before the Florida Legislature in 1963, and was acquitted.

On February 13, 1968, petitioner was elected Presiding Judge of the Sixth Judicial Circuit. He immediately demanded that various changes in the method by which criminal prosecutions were handled in the circuit, ordered one of the newly-appointed judges to duty in Pasco County for ninety days even though this judge resided in St. Petersburg, Pinellas County (this order was rescinded), indicated that he was going to transfer all domestic relations cases to one particular judge of the circuit, proposed the elimination of special masters in uncontested divorce cases, ordered the official court reporter to report all Justice of the Peace hearings upon call of the Public Defender of Pinellas County. Although some of petitioner's proposals may have been appropriate, the Commission found that they were presented in such a manner as to create turmoil, confusion and chaos within the circuit. As a result, a majority of the other judges of the circuit determined to remove or recall him as presiding judge in March of 1968. He was notified of the determination of the majority on March 19, 1968.

Judge Kelly first requested the judges to refrain from removing him or recalling him, assuring them he would return to Pasco County and not interfere with the administration of the court in Pinellas County if they would let him remain as presiding judge. When this offer was not accepted by the other judges, he requested and was granted a week's reprieve in order that he might tender his resignation as presiding judge.

After this delay, a majority of the circuit judges again met with Judge Kelly to consider his recall as presiding judge. At this meeting Judge Kelly polled all of the judges and determined that they still intended to remove him as presiding judge. He then announced his resignation; but threatened those in attendance that they would regret their actions and that he would cause them embarrassment.

Several days later he arranged an appointment with the editor and several reporters of a local newspaper in St. Petersburg to enlighten them about a petition he intended to file proposing certain alleged judicial reforms. Subsequently, on April 5, 1968, he filed with the Clerk of the Circuit Court what was styled "Petition to the Judges of the Sixth Judicial Circuit in the Circuit Court of Pinellas County." His fellow judges were not given an opportunity to see or examine the contents of the petition although it contained suggested court reforms and criticism of court administration. As an example of petitioner's public criticism of his fellow judges, the petition stated:

> "The tremendous reduction in the number of prisoners between September, 1965, and September, 1966, is an excellent case in point for the purpose of showing the gross lack of administration of the Circuit Court in Pinellas County and the serious consequences of a poorly administered Court. The change was accomplished with the simple expediency of appointing the Public Defender at an early date, and yet to bring this simple administrative

change into effect resulted unreasonably in crisis, controversy and ill-will among the judges which varied only in degree from the same response that has met every other suggestion to improve administration.

"Soon after the undersigned took office in 1961, he started urging that the procedure for expediting criminal cases, especially cases in which the defendant was being held in jail, be reviewed. Years went by and nothing was done in Pinellas County; then in 1965, your Petitioner went to the then Criminal Administrator for Pinellas County and requested the reform and argued its urgency. The rejection was unqualified. During the same time a grand jury was convened in Clearwater, empaneled by the Criminal Administrator and although it is the duty of a judge presiding over a grand jury to instruct the grand jurors of their duties, no instruction was given regarding Section 905.16 of the Florida Statutes."

" . . .

"Virtually every phase of the criminal administration at the present time is burdened with inefficiency."

" . . .

"Vast and important and much needed judicial reforms await only the interest and action by the judges of this circuit."

" . . .

"The individual judges should impose additionally upon their secretaries in handling the administration and disposition of criminal cases and thus avoid the luxury of a secretary to the Criminal Administrator or Presiding Judge."

Apparently, for the purpose of seeking favorable publicity for himself, petitioner misrepresented the

facts in this petition regarding his removal as presiding judge when he said:

> "This Petitioner has resigned a position he coveted to remove any possibility of personality and vanity as a consideration in the discharging of this obligation."

The office of the Clerk of the Circuit Court is not a receptacle for the ex parte grievance petition of a politician, particularly when the object is to seek revenge by embarrassing public officials. Since we have a government of law and not of men, no member of the judiciary should act officially as a "judge" save only as it is found in and defined by the law. Petitioner knew judicial reform could be attained in a variety of ways "under the law," but vengeance could best be served through publicizing his grievance. This was accomplished when petitioner, in his official capacity as a judge, filed his ex parte petition with the clerk so that it would be a public record.

The evidence is replete with instances in which the judicial temperament of petitioner was lacking. Nineteen of the approximately twenty-one lawyers of Pasco County were willing to, and did, sign a petition for the impeachment of Judge Kelly; seven lawyers left Dade City in Pasco County because of Judge Kelly; many cases ordinarily filed in Pasco County were filed out of the county because of Judge Kelly; attorneys and court personnel were fearful of Judge Kelly; he was rude and inconsiderate of attorneys and court personnel. His erratic behavior culminated in the filing of the petition.

The filing of the petition by Judge Kelly came to the attention of the Florida Judicial Qualifications Commission and precipitated a preliminary investigation. This Commission was created under the provisions of Sec. 17A(2), *Fla. Const.*, Subsection (3) of which contains the following provisions:

> "Any justice or judge to whom this section applies may be disciplined by private reprimand or re-

moved from office for willful or persistent failure to perform his duties or habitual intemperance or conduct unbecoming a member of the judiciary or he may be involuntarily retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature. After such investigation as it deems necessary, the judicial qualifications commission may conduct a hearing concerning the removal, discipline or retirement of a justice or judge or request the supreme court to appoint three special referees, who shall be active or retired justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the commission. . . . If after hearing, or after considering the record and report of the referees, the commission finds good cause therefor, it shall recommend to the supreme court the removal, discipline or retirement of the justice or judge. The supreme court shall review the record of the proceedings on the law and facts and shall order removal, discipline or retirement, as it finds just proper, or wholly reject the commission's recommendation."

These constitutional provisions vest jurisdiction over the discipline of circuit judges in this Court and authorize it to exercise such jurisdiction through the Judicial Qualifications Commission. By the express provision of Section 17A(1), all justices or judges included within the constitutional provision are still liable to impeachment for any misdemeanor in office.

Petitioner complains that the proceedings before the Commission and its recommendations abridge his freedom of speech in violation of the First and Fourteenth Amendments to the United States Constitution and the Declaration of Rights of the Florida Constitution. He argues that he is being *punished* solely because his petition was published in the St. Petersburg Times and cites numerous decisions saying that the criticism of the judiciary must create a clear and present dan-

ger of disrupting the administration of justice before his utterances may be *punished*.

The proceeding before the Commission lacks the essential characteristics of a criminal prosecution. The object is not to inflict punishment, but to determine whether one who exercises judicial power is unfit to hold a judgeship. The Commission, created by the Constitution as an arm of this Court, is authorized to conduct a hearing for the purpose of aiding this Court in determining whether a judge is unfit or unsuitable. Under the provisions of the Constitution this Court may exclude from the judiciary those persons whose unfitness or unsuitability bears a rational relationship to his qualifications for a judgeship, so long as the adjudication of unfitness rests on constitutionally permissible standards and emerges from a proceeding which conforms to the minimum standards of due process. In short, the essence of the sanction imposed is not "punishment" but a reprimand based on grounds bearing rational relationship to the interest of the State in the fitness of its judicial personnel. See *Sharpe v. State ex rel. Oklahoma Bar Association*, 448 Pac. 2d 301 (Okla. 1968) cert. den., 394 U.S. 904, 89 Sup. Ct. 1011, where the Court discussed the applicability of the Sixth Amendment to the United States Constitution (Right to Jury Trial), in a proceeding before the trial division of the Court on the judiciary.

In these proceedings we are not faced with the question of petitioner's right of freedom of speech or with the contents of his pronouncements. The question is whether the motive of, and the methods used by, the petitioner together with the resulting turmoil created by his actions should be considered as conduct unbecoming a member of the judiciary and contrary to the Canons of Judicial Ethics.

Public understanding of the judicial processes can be obtained only through the use of responsible and informed news reporting. This understanding secures the

respect and obedience of the general populace so that the Court may effectively protect the rights of individuals as well as the rights of society. The public's access to information concerning the functions of various branches of government should not be limited and the public's right to know should be jealously guarded by the judiciary. The courts have never demanded favorable publicity.

There are many authorized methods of protest, dissent and criticism within the framework of the judiciary, such as the preparation of dissenting opinions, petitions to the Supreme Court for changes in the rules of procedure, submission of suggested changes to various committees of the Florida Bar, participating in the various legal seminars conducted by the Committee on Legal Education, or taking an active part in the state and local conferences of judges.

Criticism is not neutral. When a judge sets himself up to criticize other judges, his criticism ultimately must be viewed as having been constructive or destructive in its impact. If he has been temperate and judicious, his criticism is likely to be, in its ultimate result, beneficial to the community which he serves — and it does not matter whether this constructive criticism is publicly or privately voiced. On the other hand, impetuous argument, or criticism taken by methods which prevent honest discussion and a fair rebuttal can be expected only to have a destructive result. No matter how bland or even wholesome the content, if the methods used raise suspicion of motives among the judges, and renders the courts all suspect to the public, the result can only be an increase in disrespect for law and order, an increase in lawlessness, a greater tendency among some of our citizens to let loose their tendencies to disorder.

By the use of the power and prestige of his judicial position, the petitioner consistently sought favorable newspaper publicity in furtherance of his general

political ambition and in an effort to force his views upon his fellow judges. He cannot avoid the resulting inquiry as to his motive and methods by invoking the right of freedom of speech in this disciplinary proceeding. We are not concerned with his right to speak, but whether his motive or method does violence to the Canons of Judicial Ethics.

The petitioner complains that the Commission report wrongfully and unnecessarily includes comments as to the alleged mental disability or illness of petitioner even though he was acquitted of this charge. The initial charges contained the charge that "you have a disability seriously interfering with the performance of your duties."

After several days of testimony, much of which related to an alleged mental disability from which Judge Kelly may have been suffering, the Commission recessed the hearing and directed that an amendment to the formal charges be filed pursuant to Rule 15, F.J.Q.C.R., setting up the alleged mental disability. Pursuant to Rule 12B, F.J.Q.C.R., the Commission further directed that Judge Kelly submit to a psychiatric examination.

Judge Kelly declined to submit to an examination by the Commission-appointed psychiatrist and the Commission resumed its hearing. Because of his failure to submit to the psychiatric examination ordered by the Commission, Judge Kelly was not allowed to offer evidence of medical doctors as to his mental condition. This limited the record to lay testimony previously given as to his mental condition in accordance with general Florida authorities. See: 6 F.L.P., *Criminal Law*, § 467; 13 Fla. Jur., *Evidence*, § 329; *Redfearn, Wills and Administration in Florida*, 4th Ed. Vol. 1, § 4.18, p. 78, and § 10.23, p. 206; *Armstrong v. State*, 30 Fla. 170, 11 So. 618; *Norman v. State*, 156 So. 2d 186 (Fla. App. 1963); *Byrd v. State*, 178 So. 2d 886 (Fla. App. 1965); *Brady v. State*, 190 So. 2d 607 (Fla. App. 1966); 72 A.L.R., p. 579; 40 A.L.R. 2d, p. 22. The Commission correctly found

that the evidence was insufficient to support a finding that Judge Kelly had a mental or emotional disability that seriously interefered with his conduct as a circuit judge. However, it was appropriate for the Commission to make reference to this testimony in determining whether the Judge, by reason of his conduct in the various matters charged, destroyed confidence in the Court and in the efficiency of the petitioner.

Because of the nature of the proceeding, the doctrines of res judicata and double jeopardy do not apply. The Commission may at any time consider any acts of misconduct which reflect adversely upon the general character and fitness necessary to the proper performance of the duties of judicial office. The accumulation of minor incidents may only justify a reprimand at this time, but, if continued, may result in unbecoming conduct sufficient to warrant removal from office. The reprimand does not amount to an acquittal, nor does it have the elements of a final judgment necessary to invoke the principles of res judicata. See 10 F.L.P., *Former Adjudication*, § 8.

Petitioner also contends that the proceedings before the Commission denied him due process of law in violation of the Fourteenth Amendment to the United States Constitution and the Declaration of Rights of the Florida Constitution in that the Commission was illegally constituted, being vested with the functions of investigation, prosecution, grand jury, and judge and jury of facts and law.

The proceedings were in accord with that established by Sec. 17A, Art. V, *Fla. Const.*, and the Rules of Procedure adopted by this Court.

The following appears in *Annotation*, 98 Law Ed. 855:

> "Procedural due process, that is, the element of the due process provisions of the Fifth and Four-

> teenth Amendments which relates to the requisite characteristics of proceedings seeking to effect a deprivation of life, liberty, or property, may be described as follows: one whom it is sought to deprive of such rights must be informed of this fact (that is, he must be given notice of the proceedings against him); he must be given an opportunity to defend himself (that is, a hearing); and the proceedings looking toward the deprivation must be essentially fair."

And further, on page 857:

> "Proceedings looking toward the suspension or revocation of a medical or legal professional license are free of any due process defect, so far as procedure is concerned, so long as the basic requisites of notice and hearing are complied with; the form of the notice and hearing is immaterial."

Attorneys were retained to present the charges and petitioner had the benefit of counsel in his defense. In fact, the hearing afforded petitioner met all the standards of judicial procedure. The findings of the Commission were not made until after a fair investigation and with such notice, hearing and opportunity to answer for the petitioner as would constitute due process. See *Annotation*, 6 Law Ed. 2d 1332.

While the Judicial Qualifications Commission is not technically a judicial tribunal, its findings and recommendations should be considered as though an intermediate agency of this Court. The Commission is in fact an arm of this Court dealing with a vital function of the Court and under its exclusive jurisdiction. While the power to render the ultimate judgment in these cases is vested in this Court, the findings and recommendations of the Florida Judicial Qualifications Commission are entitled to receive due consideration and are of persuasive force. The Constitution requires that the Commission be composed of:

"(a) Two judges of the district courts of appeal appointed by the judges of those courts and two circuit court judges appointed by the judges of those courts.

"(b) Two members of The Florida Bar, who shall have practiced law in this state for at least eight years, appointed by the board of governors of The Florida Bar; and

"(c) Three citizens, each of whom shall have been a resident of this state for at least five years, neither of whom shall be a justice or judge of any court, active or retired, nor a member of The Florida Bar, appointed by the governor." Sec. 17A(2), Art. V, *Fla. Const.*

In view of these constitutional provisions prescribing the composition of the Commission, its findings should be given great weight. However, the ultimate responsibility of making a determination rests with this Court, for Sec. 17A(3), *Fla. Const.*, requires that the Supreme Court, after reviewing the record, "shall order removal, discipline or retirement, as it finds just and proper, or wholly reject the Commission's recommendation."

The findings of the Commission comntained the following:

> "The publicity incidental to the filing of this petition did bring the Sixth Judicial Circuit into disrepute and, as testified to, it was known as the "sick" Circuit. Certainly the public has a right to know of the affairs of its judicial system and our finding is not a criticism of the public's right to know of the court's operation. Our finding is that Judge Kelly failed to follow recognized methods of proposing changes in judicial procedure, that he failed to cooperate with his fellow Judges in that he did not afford them an opportunity to be aware of his charges and the contents of the petition or give them an opportunity for consideration thereof

prior to filing. Rather, he was more interested in creating controversy and in publicity for himself than in accomplishing court reform.

"It is our conclusion that said conduct and activities violated Canons 8, 20, 21, 23, and 34 of the Canons of Judicial Ethics as adopted by the Supreme Court of Florida."

The Canons of Judicial Ethics referred in the findings are as follows:

"8. Court Organization.

"A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

"It is desirable too, where the judicial system permits, *that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.*" (Emphasis supplied)

"20. Influence of Decisions upon the Development of the Law.

"*A judge should be mindful that his duty* is the application of general law to particular instances. *that ours is a government of law and not of men,* and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. *He should administer his*

office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law." (Emphasis supplied)

"21. Idiosyncrasies and Inconsistencies.

"Justice should not be moulded by the individual idiosyncrasies of those who administer it. *A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court.* Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

"In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency." (Emphasis supplied)

"23. Legislation.

"*A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice;* and to ascertain whether they tend to impede the just disposition of controversies; *and he may well contribute to the public interest by advising those having authority to remedy defects of procedure*, of the result of his observation and experience." (Ephasis supplied)

"34. A summary of Judicial Obligation.

"In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of

public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity." (Emphasis supplied)

The findings of the Judicial Qualifications Commission are amply supported by the record and are approved and adopted by this Court.

The crucial question is whether the activities of the petitioner were for the purpose of effecting court reform or for the purpose of securing personal notoriety and furthering a career in politics.

There were many witnesses who testified on behalf of petitioner and he has enjoyed popularity among many of the electors. Any arm of government should be reticent in exercising the power to nullify the elective process by discipline or removal of elected officials. But this constitutional power, granted to this Court by the mandate of the people, should be exercised when the judiciary is endangered by a judge seeking to bolster his personal image.

Ordinarily, elected officials who wish to stay in office must organize their behavior according to rational standards; if not, they are likely to be defeated at the polls or at least will face expensive and harrowing campaigns for re-election. Under our system, where judges are elected, the members of the judiciary are constantly enmeshed in the conflict between candor and responsibility—maintaining the candor of the politician without shirking the responsibilities of a judge. The Judicial Canons of Ethics provide the guidelines for the conduct of our Judges.

The personal integrity, intellectual vigor, and selfless dedication of a judge should be directed toward the attainment of what he earnestly believes to be sound law, wise public policy, and justice. Candid discussion and mutual trust among the judges of a court are of great value in attaining these ends. These are the responsibilities of a judge. In his candor as a politician, an individual judge should never protest or dissent in such a manner as to discourage the free exchange of ideas within the court, for this free exchange of ideas is an important function in the judicial process of reaching the goal of sound law, wise public policy, and justice.

It may often be difficult for a judge to work toward overturning a ruling or an administrative policy of the Court without injuring or risking injury to the prestige of the Court. Stirring up resistance among fellow judges by threatened adverse publicity is fraught with danger. It is dangerous to the judge's position within the Court since his colleagues may take such a threat as an act of institutional disloyalty. It is dangerous to the possible future success of his own policies. Moreover, it could be dangerous to the prestige and general power of the Court in encouraging not only additional opposition, but also attacks from misinformed groups and agencies who happen to be alienated by virtue of some former decision or policy of the Court.

The candor of petitioner as a politician resulted in a large group of dedicated followers, but, in the final analysis, his candor as a politician caused him to shirk his responsibilities as a member of the judiciary. Every man in public office hungers for public esteem, but no man has the right to buy this esteem with the stolen coin of other men's public reputations, not even a twice-elected member of the judiciary.

The petitioner clearly violated the basic principles of the Canons of Judicial Ethics. Continued violations of these principles by a judge could make our judiciary another Samson, blind to duty and swollen with power,

pulling down the pillars that support our most cherished institutions.

The Commission has recommended that petitioner be required to discharge the duties of resident Circuit Judge of Pasco County in the Sixth Judicial Circuit and refrain from service in Pinellas County of the Sixth Judicial Circuit unless assigned by the Presiding Judge of the Circuit to duty in Pinellas County, pursuant to Rule 1.020(c) (4), Florida Rules of Civil Procedure.

Sec. 17A (3), Art V, *Fla. Const.*, authorizes this Court to order "removal, discipline or retirement as it finds just and proper." This authorization does not contemplate an order limiting the activities of a duly elected Circuit Judge to a specific area in the Circuit. The Presiding Judge has the authority to enter such orders as may be necessary "for the efficient and speedy disposition of the business of the Court." Rule 1.020(c) (1), Florida Rules of Civil Procedure. Matters of internal administration should be left to the Presiding Judge. The recommendations of the Commission are modified so as to strike therefrom subparagraph (d), reading as follows:

> "In accordance with his admission that there is sufficient work in Pasco County to keep him occupied on a full time basis, that he discharge the duties of a resident Circuit Judge of Pasco County in and for the Sixth Judicial Circuit, and refrain from service in Pinellas County of the Sixth Judicial Circuit, unless assigned by the Presiding Judge of said Circuit to duty in Pinellas County pursuant to Rule 1.020(c) (4), Florida Rules of Civil Procedure."

Petitioner Richard A. Kelly has engaged in conduct unbecoming a member of the judiciary and he is hereby publicly reprimanded for such conduct. The said Richard A. Kelly is admonished to comply with his oath as

a member of the judiciary and to abide by the Canons of Judicial Ethics as a member of the judiciary, particularly in cooperating with his fellow judges, following the normal method for seeking procedural changes as to the administration of justice in the Sixth Judicial Circuit, and refraining from seeking personal publicity or attempting to advance his personal ambitions through the public information media. The entire record of this inquiry may be introduced into evidence in any subsequent inquiry which may be brought before the Judicial Qualifications Commission concerning Richard A. Kelly.

It is so ordered.

THORNAL, CARLTON and BOYD, JJ., concur

ERVIN, C. J., dissents with opinion

LARKIN and LaMOTTE, Circuit Judges, dissent and concur with ERVIN, C. J.

ERVIN, C. J., dissenting:

The charges against Judge Kelly and the findings of the Commission from the evidence taken thereon do not logically appear to me to fall within the category of habitual judicial intemperance or unbecoming judicial conduct as contemplated in Section 17 A(3), Article V, State Constitution.

First, I do not find from the record that Judge Kelly violated constitutional sanctions against judicial intemperance and unbecoming judicial conduct by his action of filing with the Clerk of the Circuit Court of Pinellas County a document, styled "Petition to the Judges of the Sixth Judicial Circuit in the Circuit Court of Pinellas County," which generated certain attendant publicity. I do not find from the record that Judge Kelly's proposals for administrative judicial reform in his

circuit "were presented in such a manner as to create turmoil, confusion and chaos within the Circuit."

It appears that in filing his petition and submitting to interviews by press representatives concerning it, Judge Kelly was seeking reconsideration by his fellow judges of his proposals as well as explaining to the public his side of the disagreement which had resulted in a majority of the judges in the circuit requiring him to resign as presiding judge, to which post they had elected him. In his petition, he sought to justify certain changes he had inaugurated as presiding judge in the procedural and administrative work in the circuit, as well as certain proposals he had submitted to his fellow judges to achieve alleged reforms in handling the judicial work of the circuit. He set forth in his petition criticisms of certain conditions in the circuit which he alleged were detrimental to good judicial administration.

By filing the petition he appears to have followed the tradition of free citizens who having suffered the smart of official demotion or public censure make public their side by way of explanation or justification. If, for example, the grand jury of the county censured him, he would be within his rights to make some reply or defense if he desired. No doubt certain quiet-souled judges, upon being similarly displaced as was Judge Kelly and seeing their hopes for certain judicial reforms evaporate, would have resignedly accepted the situation without murmur; but it was not constitutionally required that Judge Kelly follow a like course. Each man's reaction or rejoinder to frustration or provocation conceivably will differ in kind or degree.

The Judicial Qualifications Commission concludes Judge Kelly's related action was motivated by personal vanity to bolster his public image and to revenge himself upon some of his colleagues who had disagreed with him and required him to resign as presiding judge of the circuit. I am unable to agree. I am constrained to believe the Commission's finding reaches too deeply into

the psychological motivation of the Judge in a very nebulous, debatable area. It would be just as easy to infer his motivation was confined to an explanation and justification of his views on court reform and was designed to enlist public support for his proposals without vindictiveness or malice. Aside from psychological considerations, the external trappings or methods of his response to his colleagues' demotion of him appear not to be abusive, contumacious, malicious, or ruinous, and at any rate were permissible in law under the First Amendment privilege.

I believe Judge Kelly had an untrammeled right to publicly explain his side of the disagreement with certain of his judicial colleagues; petition or appeal to his colleagues for reconsideration; and seek public understanding and support of his proposed reforms. Since a majority of his judicial colleagues brought about his removal as presiding judge, he had a kind of "qualified privilege," to borrow a phrase from the law of libel, to publicly explain his side of the affair in moderate, unmalicious, and unabusive language. Certainly he, a judge periodically subjected to the elective process to retain his judgeship, had cause to feel aggrieved by the turn of events that affected his public stature or figure and in the constitutional scheme of free expression could seek a reconsideration by his colleagues as well as justify to the public his side of the affair and did not have to stand mute under the circumstances merely because he is a judge. Further, Section 23 of Rule A, "Ethics Governing Judges," authorizes judges because of their judicial experience to advise "those having authority to remedy defects of [judicial] procedure" of the results of their observation and experience as a contribution "to the public interest." This Judge Kelly did in his petition to his fellow judges, who are authorized to submit local court rules changes to this Court for approval.

I do not find from the record that his public reaction to his colleagues' demotion of him was either malicious abusive, profane, contumacious, arrogant, or

hostile, or that it passed beyond the bounds of judicial decorum or good taste. It did not descend into rancorous personality or verbal impropriety. He made no personal attack on any of his fellow judges nor did he in anywise impugn the character of any of them, although he incidentally criticized their judgment in disagreeing with his proposed reforms.

Underlying the charge of which the Commission found him guilty is the impact caused by the attention given his petition in the local press. Moreover, although the Commission claims its inquiry was not concerned with the "content" of the petition, its brief somewhat inconsistently implies that Judge Kelly's criticisms are not protected against reprisal because the criticisms are not "constructive." Obviously, the Commission's recommendations proceed upon the theory that the contents of the petition allegedly embarrassed the other judges of the Sixth Circuit and lowered the image of that Court. I do not believe his fellow judges should have been so sensitive to the attendant publicity since news reporting in areas of public interest is a fact of life. The Commission should realize also no cloak of immunity can shroud the judiciary from interventions of the press.

This is not the first case in American jurisprudence involving public criticism of the judiciary. Other courts have clearly set out the boundaries within which critics must remain. Fortunately for our democratic society, these boundaries are wide.

Before any man may be punished for speech in a newspaper critical of the courts, the record must show that his criticism has created a clear and present danger of disrupting the administration of justice. Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed. 2d 569 (1962); Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.Ed. 1546 (1946); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed 1295 (1945); Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941).

Disruption of the administration of justice is shown by evidence that a particular party to litigation has been prejudiced, that the outcome of a trial has been influenced or that a petit jury has been affected; Wood v. Georgia, supra.

With respect to a judge's sensitivity to newspaper criticism, the United States Supreme Court has stated:

> "Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Craig v. Harney, supra, at 331 U.S. 376, 67 S.Ct. 1255.
>
> [Newspaper criticism] . . . "may influence some judges more than others. Some are of a more sensitive fiber than their colleagues. The law deals in generalities and external standards and cannot depend on the varying degrees of moral courage or stability in the face of criticism which individual judges may possess . . ." Pennekamp v. Florida, supra, at 328 U.S. 348, 66 S.Ct. 1038

Furthermore, the effectiveness of such criticism is immaterial when the question is whether the criticism is to be punished:

> "Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations." New York Times v. Sullivan, 376 U.S. 254, 273, 84 S.Ct. 710, 772 (1962).

Judge Kelly unquestionably had the right to speak publicly on a matter so fraught with public concern as the administration of the courts in the Sixth Judicial Circuit without incurring judicial sanctions, even if his petition was incidentally critical of his fellow judges. As the United States Supreme Court observed in Pickering v. Board of Education, 391 U.S. 563, 570, 88 S.Ct. 1731, 1735 (1968):

> "[T]o the extent that the Board's position here can be taken to suggest that even comments on the matters of public concern that are substantially correct . . . may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it."

The truth may not be punished, either criminally or civilly. Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). Moreover, even if Judge Kelly's criticisms of official conduct in the Sixth Judicial Circuit were in error factually and were defamatory (a matter not charged against him), Judge Kelly would remain protected by the constitutional guaranty of free speech, so long as there has been no finding that his statements were knowingly false or made with reckless disregard of their truth or falsity. Pickering v. Board of Education, supra; New York Times v. Sullivan, supra; Garrison v. Louisiana, supra; St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968).

It is clearly unconstitutional to require any man to present his ideas to official authorities for their prior consideration and approval. Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1964) It is equally unlawful to threaten an individual with loss of public employment for exercising his constitutional right to speak out on matters of public concern. Pickering v. Board of Education, supra. Consequently, in order that Article V, Section 17 A of the Florida Constitution may be compatible with the First and Fourteenth Amendments to the United States Constitution, it must not be permitted to censor free expression.

Tragic implications could result from the precedent of discipline of Judge Kelly for speaking out on the need for court reform. The people of Florida will suffer if their judges must restrict their public statements to uncritical banalities in order to avoid the threat of similar sanctions. The right to disagree with others in matters

of governmental policy is one of the cherished rights of American citizenship. It cannot be watered down by a board of censors or subjected to the possibility of sanctions that make its exercise a fearful prospect. The courts exist to serve the people. If the courts are not operating as efficiently as is humanly possible, then the people have the right to hear this from the individuals who are best able to tell them—the judges.

If the First Amendment does not protect a judge's right to speak in circumstances such as these, then we are bound to have in Florida a timorous lot of judges lacking independence, afraid of their judicial shadows, and fearful to exercise conscientiously the right to speak out in favor of judicial reform.

I do not believe the reach of the Code of Ethics Governing Judical Conduct can be construed to deny Judge Kelly his privilege of speaking out under the related circumstances or that in doing so he violated the code. In the setting in which he exercised his right to speak he had certain inherent privileges, if not a duty to seek judicial reform. In the context within which he spoke, we note: He is a judge in a multi-judge circuit (there are twelve incumbent Circuit Judges in the 6th Circuit); in fact, until removed, he was the duly elected presiding judge. Such a circuit, with multiple judges, in the matter of division of the judicial labor therein alone involves many administrative and procedural problems which reasonably could be the concern of any of the circuit judges justifying him to suggest changes and reforms. Judge Kelly, *a judge elected by the people*, had advocated certain things he considered would reform and improve the judicial machinery of his circuit. As presiding judge, he put into effect some of the changes he advocated. For his pains in seeking changes, whether correct or misguided, he was relieved of his status as presiding judge and undoubtedly suffered diminution of public stature. At this juncture he attempted by petition to get his fellow judges to reconsider and he sought to explain to the public his side of the affair and appealed

for public support in behalf of the changes he proposed and the reforms he alleged were necessary. I do not find that what he did or sought to do passed beyond the bounds of judicial decorum or good behavior, or publicly trespassed upon those hallowed precincts of the judiciary which, according to some, can only be entered into with propriety in secret conclave with the priesthood of fellow judges and such matters as Judge Kelly raised there discussed, but never in the "sunshine" of lay publicity. Moreover, I think he had First Amendment protection for what he did.

Second, the other matters charged against Judge Kelly are equally without redeeming merit. There was much rehash of old charges of judicial intemperance and arrogance against Judge Kelly concerning his alleged conduct in court and his alleged hostility and mistreatment of certain attorneys. Many of these charges previously went down the drain and were not vindicated in early legislative impeachment attempts against him or were based on incidents transpiring before the adoption of Section 17 A of Article V, under which the Commission functions.

Numerous witnesses, including nineteen lawyers, three bailiffs, three court reporters, twenty-four jurors, overwhelmingly refuted various facets of the charges. Most of the charges emanated from disgruntled court personnel. Testimony by witnesses to his courtroom conduct establishes Judge Kelly as a competent and temperate judge. Trial lawyers of statewide and national reputations and jurors testified he was fair to all litigants and courteous to attorneys and jurors and made well-considered rulings.

There was no substantiation by competent evidence that the Judge was mentally or emotionally irrational and the Commission did not so find.

Judge Kelly admits to being somewhat of a reformer, particularly in the judicial area—a trait which is

often suspect by those who cling to the status quo. However, this trait, even if displeasing to lovers of ancient or outmoded forms, ought not be equated with irrationality or mental instability.

More than sixty-five witnesses, including two physicians, testified the Judge had never manifested any form of irrationality, even upon tense circumstances.

I conclude no clear and convincing showing substantiates the second charge.

In summation, I think this is a regrettable inquiry that probably ought never to have been pursued. The Commission should have been extremely cautious in launching an inquiry in the sensitive area of an elected official's inherent right to function in the sphere of free expression.

There is every reason why a corrupt, senile, insane, venal or obviously vindictive judge should be subjected to inquiry. So should one whose conduct is so habitually gross it clearly passes beyond the bounds of traditional and well-recognized judicial decorum or whose lack of a becoming judicial demeanor or whose arrogance obviously reaches the point of habitual intemperance. The Commission can unquestionably discipline in those areas of judicial conduct. But here the Commission in its very first inquiry essayed to venture into a very nebulous and debatable situation involving the psychological motivation of a judge and in the process equated his right to speak out on the subject of judicial reform as the prime example of his unbecoming conduct and bad behavior.

By so venturing, we have at our threshhold for the first review of findings of the Commission, issues that set at stake the most fundamental concepts of a free democratic society.

The Commission brings into question the right of an *elected* judge to speak publicly on matters of public concern and the right of the people of this state to be

informed of the administration of an important function of their government. The courts of this country have jealously guarded these rights against encroachments of all kinds.

Central to this democratic process is access to accurate information, for without this information the people cannot exercise their control of government.

Judge Kelly, a knowledgeable judicial officer with several years' experience on the bench, as a part of his effort to obtain what he considered to be judicial reform in his circuit, told the public what he felt they needed to know about the administration of a vital arm of government. By filing his petition in furtherance of his proposed changes, Judge Kelly sought reconsideration by his fellow judges and supplied information upon which he expected the people to make a judgment concerning his disagreement with his fellow judges about the needs he alleged were essential for court reform. Petition filing is constitutionally "established procedure" in this country for presenting information and recommendations relative matters of governmental policy to affected officials and in the bargain may appeal to the public for consideration and support. It is a method that has never been constitutionally condemned, since it is one of the principal elements of the democratic process. It would be unfortunate to excise from the democratic process the troublesome willingness of a judge to publicly make known his feelings about court reform.

Woven throughout the fabric of these proceedings is a disturbing question: Under what conditions may the elective process be nullified by the discipline or removal of elected judicial officials? The question is a disturbing one because in a democratic society the people's elected officials should not be disturbed in their tenure except in instances of great aggravation.

This question has never emerged in sharp focus in these proceedings but is present nonetheless. Undoubt-

edly. Most thoughtful people who have come into contact with this case are troubled by it. Everyone would undoubtedly agree that the corrupt, the senile, and the insane have no place in the judiciary and that the people of this state, whose votes approved Article V, Section 17 A of the Constitution, reasonably believed that the Commission would discipline any members of the judiciary who were corrupt, senile or insane. However, there is no showing in the record before this Court that Judge Kelly is corrupt, senile, or insane. The question then recurs whether he was blatantly and maliciously guilty of habitual inteperance or unbecoming judicial conduct. Was his judicial conduct habitually gross and abusive?

Judge Kelly did criticise the matter in which the circuit was being operated. In so doing he "rocked the boat," and annoyed some of his fellow judges, who professed to being embarrassed by the attendant publicity. For this, the Commission has recommended that he be punished. From this recommendation the question arises whether the people of this State knew when they voted on Article V, Section 17 A, that the Judicial Qualifications Commission would proceed against a judge who spoke publicly of the need for court reform.

I glean from the record that Judge Kelly appears to believe in popular control of government and efficient courts. He believes he has a duty to inform the people about inefficient conditions in their courts. He admits he so informed the people. Judge Kelly submits, however, that speaking out on a matter of such public concern today as the efficient administration of the courts is an exercise of his constitutional rights and fulfillment of a positive duty and is not habitual intemperance or unbecoming judicial conduct. I am constrained to agree with him because I believe his speaking out in the premises is constitutionally guaranteed.

I would dismiss the charges against him.

LARKIN and LaMOTTE, Circuit Judges, concur

IN THE SUPREME COURT OF FLORIDA

JULY TERM A.D. 1970

MONDAY, SEPTEMBER 14, A.D. 1970

Inquiry Concerning A Judge No. 1
Richard A. Kelly, Circuit Judge

Case No. 38,595

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby, denied.

SID J. WHITE
Clerk Supreme Court

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Florida and Appendix "A" have been furnished by U.S. mail, postage prepaid to Honorable William D. Hopkins, Attorney for the Forida Judicial Qualification Commission, Supreme Court Building, Tallahassee, Florida 32302; and to the Cerik of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32302, on this _____ day of December, 1970.

JOHN W. BOULT, ESQUIRE, OF
FOWLER, WHITE, GILLEN,
HUMKEY & KINNEY, P.A.
Post Office Box 1438
Tampa, Florida 33601
Counsel for Petitioner

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SUPREME COURT, U. S.

Supreme Court, U.S.
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DEC 11 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1087

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE,
Petitioner,

vs.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION,
Respondent.

APPENDIX "F" TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOHN W. BOULT,
Esquire of
FOWLER, WHITE, GILLEN, HUMKEY & KNOWLTON, P.A.
Post Office Box 1438
Tampa, Florida 33601
Counsel for Petitioner

Of Counsel
EDWARD M. WALLER, JR.,
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JONES PRINTING CO., INC., TAMPA, FLORIDA

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STATE OF FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION
SUPREME COURT BUILDING
TALLAHASSEE

32302

June 24, 1968

Honorable Richard A. Kelly
Pasco County Courthouse
Dade City, Florida

Judge Kelly:

Pursuant to the provisions of Section 17A, Article V, Constitution of the State of Florida, and the Rules of the Florida Judicial Qualifications Commission, as adopted by the Supreme Court of Florida, on March 6, 1968, you are hereby notified that the Florida Judicial Qualifications Commission, on its own motion, is conducting an investigation of your conduct in filing on April 5, 1968, in the office of the Clerk of the Circuit Court, Pinellas County, Florida, a certain petition, and thereby making the matters set forth therein public.

If the petition was filed by you for the purpose of publicly embarrassing other circuit judges in the Sixth Judicial Circuit without proper foundation or factual basis, your conduct in filing the same may have been conduct unbecoming a member of the judiciary.

The Commission will meet at 9:00 o'clock a.m., on Friday, July 12, 1968, at the Pasco County Courthouse, Dade City, Florida. Pursuant to Rule 8(b) of the Rules of the Florida Judicial Qualifications Commission, (207 So.2d 443), you may at said time and place make a statement, personally or by counsel, verbally or in writing, sworn or unsworn, explaining, refuting, or admitting your conduct as above set out.

Very truly yours,

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By /s/ John S. Rawls

John S. Rawls, Chairman

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 1.

IN THE NAME OF THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION:

TO: Honorable Richard A. Kelly
Circuit Judge
Sixth Judicial Circuit of Florida
Route 2, Box 225-A
Zephyrhills, Florida

Pursuant to the provisions of Article 5, Section 17a of the Constitution of the State of Florida and the Rules of the Florida Judicial Qualifications Commission, as adopted by the Supreme Court of Florida, you are hereby notified of the institution of formal proceedings to inquire into the following charges against you:

That you are guilty of conduct unbecoming a member of the Judiciary and that you have a disability seriously interfering with the performance of your duties as a Circuit Judge of the Sixth Judicial Circuit of Florida, which is, or is likely to become, permanent in nature, by:

I

Failing to cooperate with other Circuit Judges of the Sixth Judicial Circuit while presiding Judge of said Circuit during the months of February, March and April, 1968, contrary to Canon Eight of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

II

Attempting to seek alleged change in Court procedures, in a manner contrary to Canons Eight, Twenty and Twenty-three of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

III

Seeking publicity with the intent to embarrass the other judges of the Sixth Judicial Circuit by filing a petition with the Clerk of the Circuit Court of Pinellas County, Florida, on April 8, 1968, a copy of which is attached hereto as Exhibit A, without prior thereto affording the other judges of said circuit an opportunity to consider the contents of said petition, but by appraising members of the press of the contents of the petition prior to filing the same, contrary to Canons Eight and Twenty-one of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

IV

Seeking to embarrass the other judges of the Sixth Judicial Circuit by filing a petition with the Clerk of the Circuit Court of Pinellas County, Florida, on April 8, 1968, without prior thereto affording the other judges of said circuit an opportunity to consider the contents of said petition, but by appraising members of the press of the contents of the petition prior to filing the same, which petition contained inaccurate factual information contrary to Canons Eight and Twenty-one of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

V

Using the office of Circuit Judge of the Sixth Judicial Circuit for the purpose of advancing your personal ambitions and publicity to the detriment or embarrassment of your fellow Circuit Judges of the Sixth Judicial Circuit contrary to Canons Eight, Twenty-one, Twenty-three and Thirty-four of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

VI

Creating turmoil by criticizing the other judges and court personnel of the Sixth Judicial Circuit as well as the administration of the court, contrary to Canons

Four, Eight and Thirty-four of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

VII

Conduct leading to the disrespect for, and the lowering of, the image of the court.

VIII

Failing to be considerate of, and courteous to, counsel and others in attendance upon the court, contrary to Canons Nine and Ten of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

IX

Misleading the other judges of the Sixth Judicial Circuit regarding your willingness to resign as presiding judge in order to preclude your removal as presiding judge of the Sixth Judicial Circuit.

X

Embarrassing another judge of the Sixth Judicial Circuit by summoning a Grand Jury already charged by such judge and recharging them as to their duties.

You have the right to file a written answer to the charges against you within twenty days after service of this notice upon you.

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

By: /s/ William D. Hopkins

WILLIAM D. HOPKINS
Hopkins, Folsom & Steinmeyer
Lewis State Bank Building
Tallahassee, Florida

Counsel for the Florida Judicial
Qualifications Commission

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
INQUIRY CONCERNING A JUDGE, NO. 1.

MOTION TO DISMISS AND REQUEST FOR ORAL ARGUMENT

The respondent, RICHARD A. KELLY, by and through his undersigned attorneys, specially appears for this purpose only and moves the Commission for the entry of an order dismissing the charges filed herein against him, and each of them severally, or in the alternative, enter a formal finding that there is not probable cause to believe that he is guilty of any misconduct, on the ground that this Commission is without jurisdiction. In support thereof, Respondent states:

1. This Commission is without jurisdiction, in that in violation of Rules 25 and 29(c), FJQCR, the Commission failed to institute formal proceedings, or to enter a formal finding that there is not probable cause to believe that Respondent is guilty of any misconduct, within 60 days of the filing by this Respondent of a written demand in the manner specified in Sec. 29(C) FJQCR.

2. This Commission is without jurisdiction, in that in violation of Rules 25, 29(c) and 9(b), FJQCR, no charges of sufficient particularity specifying the facts relied upon in support thereof were timely filed, and in the alternative, this Commission is without jurisdiction to consider any particular charge that is inadequately pled in violation of said FJQCR.

3. This Commission is without jurisdiction in that the charge of disability and the charges contained in Sec. VI, VII, VIII, IX and X, were never presented to the Respondent during the course of the investigatory proceedings, thereby denying to Respondent the opportunity to respond thereto, in violation of Rule 8(b), FJQCR.

4. This Commission is without jurisdiction because the Commission is illegally constituted, in violation of Article V, Sec. 17A of the Florida Constitution, in that the Commission has failed to act upon or consider Respondent's affidavit pertaining to prejudice on the part of a member of this Commission as provided by Rule 5, FJQCR, and further, in the alternative, that Rule 5, FJQCR, provides for a replacement of disqualified members in a manner contrary to the provisions of the above noted constitutional provision.

5. This Commission is without jurisdiction over the Respondent herein, in that the Rules of the Florida Judicial Qualifications Commission violate the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the Declaration of Rights of the State of Florida, in that by way of example and without limitation, said rules and conduct of the Commission violate the Respondent's constitutional right to freedom of speech and his constitutional protection against self-incrimination, and further violate the Respondent's constitutional right to a trial by a jury of his peers, drawn from a cross-section of the community, and further do not afford the Respondent procedural due process, in that these proceedings are penal in nature and the Rules do not provide an adequate degree of protection to the Respondent in connection with said proceedings, and further violate the Respondent's right to be afforded due process of law in that said Rules constitute this Commission investigator, prosecutor and judge of the charges herein.

WHEREFORE, Respondent prays that the charges filed herein against him be dismissed.

MASTERSON, LLOYD,
SUNDBERG & ROGERS,
447 3rd Avenue North,
St. Petersburg, Florida,
-and-
FOWLER, WHITE, COLLINS, GILLEN,
HUMKEY & TRENAM,
712 Florida Office Building,
St. Petersburg, Florida 33701,
By /s/
MICHAEL L. KINNEY.

REQUEST FOR ORAL ARGUMENT

The Respondent respectfully requests oral argument on the foregoing motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been sent by United States Mail to the Honorable William Hopkins, attorney for the Florida Judicial Qualifications Commission, and to each Member of the Commission, at his address of record, by Certified Mail, Return Receipt Requested, this 27 day of November, 1968.

/s/ Michael L. Kinney

Attorney.

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 1.

ORDER

Respondent's Motion to Dismiss and Request for Oral Argument, dated 27 November 1968, having been duly considered by the Commission and it appearing that the Rules of the Judicial Qualifications Commission promulgated by the Supreme Court of Florida on March 6, 1968, and reported in 207 So.2d 443, do not provide for the filing of such Motion, it is therefore

ORDERED that said Motion be and the same is hereby stricken ex mero motu.

DONE and ORDERED this 8th day of December, A. D. 1968, at Miami, Florida.

/s/ John S. Rawls
CHAIRMAN

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
INQUIRY CONCERNING A JUDGE, NO. 1.

ANSWER

The Honorable Richard A. Kelly, through his undersigned attorneys, without waiving any of his Constitutional rights either under the Federal Constitution or the Constitution of the State of Florida, and without waiving his challenge to the jurisdiction of this Commission as set forth in his motion to dismiss previously filed with this Commission, and without waiving his right to petition the Supreme Court for a hearing prior to any further action by this Commission, files this, his response and answer to the formal proceedings filed against him and states:

FIRST DEFENSE

He denies each and every allegation whether numbered or unnumbered of the formal proceedings.

SECOND DEFENSE

For a second defense, the Honorable Richard A. Kelly states that this Commission lacks jurisdiction over the subject matter of these proceedings in that it has violated Rules 25 and 29(c) FJQCR by failing to institute formal proceedings or to enter a formal finding that there is not probable cause to believe that Respondent is guilty of any misconduct within sixty (60) days of the filing by the Honorable Richard A. Kelly of a written demand in the manner specified in Sec. 29(c) FJQCR.

THIRD DEFENSE

This Commission is without jurisdiction, in that in violation of Rules 25, 29(c) and 9(b) FJQCR, no chargen of sufficient particularity specifying the facts relied upon in support thereof were timely filed, and in the alternative, this Commission is without jurisdiction to consider any particular charge that is inadequately pled in violation of said FJQCR.

FOURTH DEFENSE

This Commission is without jurisdiction in that the charge of disability and the charges contained in Sec. VI, VII, VIII, IX and X were never presented to the Respondent during the course of the investigatory proceedings, thereby denying to Respondent the opportunity to respond thereto, in violation of Rule 8(b) FJQCR.

FIFTH DEFENSE

This Commisamsion is illegally constituted, in violation of Article V, Sec. 17A of the Florida Constitution, in that the Commission has substituted one of its members to replace a disqualified member in a manner contrary to the provisions of the above noted constitutional provision.

SIXTH DEFENSE

This Commission is without jurisdiction over the Respondent herein, and this Commission as constituted and the proceedings herein and the rules under which said proceedings are conducted, together and severally, violate the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the Declaration of Rights of the State of Florida, in that by way of example and without limitation, said rules and conduct of the Commission violate the Respondent's constitution right to freedom of speech and his constitutional protection against self-incrimination, and further violate the Respondent's constitutional right to a trial by a jury of his peers, drawn from a cross-section of the community, and further do not afford the Respondent procedural due process, in that these proceedings are penal in nature and the Rules do not provide an adequate degree of protection to the Respondent in connection with said proceedings, and further violate the Respondent's right to be afforded due process of law in that said Rules constitute this Commission investigator, prosecutor and judge of the charges herein.

WHEREFORE, Respondent prays that the charges filed herein against him be dismissed.

MASTERSON, LLOYD, SUNDBERG & ROGERS,
447 3rd Avenue North,
St. Petersburg, Florida,
—and—
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM,
712 Florida Office Building,
St. Petersburg, Florida
By Michael L. Kinney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been sent by United States Mail to the Honorable William Hopkins, Attorney for the Florida Judicial Qualifications Commission, and to each Member of the Commission, at his address of record, by Certified Mail, Return Receipt Requested, this 27th day of December, 1968

/s/ MARVIN E. BARKIN,
Attorney

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE, NO. 1.

RICHARD A. KELLY, CIRCUIT JUDGE

REPORT OF THE JUDICIAL QUALIFICATIONS COMMISSION

Comes now the Judicial Qualifications Commission[1] and files this, its Report to the Supreme Court of Florida regarding the Honorable Richard A. Kelly, Circuit Judge of the Sixth Judicial Circuit, together with its findings of fact, conclusions, and recommendations for disciplinary action in accordance with the rules of the Supreme Court of Florida, adopted pursuant to Section 17(a), Article V, Constitution of the State of Florida of 1885, as amended and reported in 207 So.2d 443.

---

[1] The Florida Judicial Qualifications Commission consists of John S. Rawls, Judge of the First District Court of Appeal, Tallahassee; Thomas H. Barkdull, Jr., Judge of the Third District Court of Appeal, Miami; Woodrow M. Melvin, Judge of the First Judicial Circuit, Milton; James S. Moody, Judge of the Thirteenth Judicial Circuit, Plant City; General Paul D. Adams (Ret.), Tampa, Admiral Robert Goldthwaite (Ret.), Pensacola, and Gilmer A. MacDougald, Fort Lauderdale, appointed as lay members of the Commission; Charles A. Kimbrell, member of The Florida Bar, Miami. The foregoing members were selected for membership on the Commission pursuant to the provisions of § 43.20, Fla. Stat. (1967). The Florida Bar selected Richard T. Earle, Jr., of St. Petersburg, as one of the regular members of the Commission. Prior to the filing of formal charges in this matter, Richard T. Earle, Jr., disqualified himself from further proceedings and, pursuant to 5(a) FJQCR, the Commission appointed Mark Hulsey, Jr., of Jacksonville, member of The Florida Bar, to replace Richard T. Earle, Jr., which appointment was approved by the Executive Committee of the Board of Governors of The Florida Bar, pursuant to the Integration Rule of The Florida Bar.

BACKGROUND

In the spring of 1968, it came to the attention of the Commission that the Honorable Richard A. Kelly, Circuit Judge of the Sixth Judicial Circuit, had filed a petition in the Public Records of Pinellas County, Florida, within the Sixth Judicial Circuit, which was receiving a great deal of notoriety. Upon preliminary investigation, it appeared that the petition was filed by Judge Richard A. Kelly not for the purpose of improving the administration of justice in the Sixth Judicial Circuit but was filed apparently in retaliation for being recalled or removed as Presiding Judge by the other judges of the circuit.

Thereafter, the Commission on its own motion made an informal inquiry into the matter and twice proceeded to Dade City, Florida, the County Seat of Pasco County, wherein Judge Kelly resided, in an attempt to resolve this matter. These journeys to Dade City were futile, as Judge Kelly and his lawyers declined to communicate or explain his actions in filing the petition to the Commission. The last of these journeys was made in August of 1968, at which time the Commission was met with a motion filed by Judge Kelly, pursuant to 29(c) FJQCR, requiring the Commission to either institute formal charges within sixty (60) days or make a finding of no probable cause and file same with the Supreme Court of Florida as a matter of public record. Thereafter, formal charges were filed against Judge Kelly, pursuant to 9 FJQCR. Judge Kelly ultimately met the charges by an answer containing certain defenses, and demanded a public hearing pursuant to 29(d) FJQCR. The matter was set for hearing on January 29, 1969, in the County Courthouse, Dade City, Pasco County, Florida.

After several days of testimony, much of which related to an alleged mental disability from which Judge Kelly may have been suffering, the Commission recessed the hearings until March 10, 1969, and directed that an amendment to the formal charges be filed pursuant to 15 FJQCR, setting up the alleged mental disa-

bility. The Commission further directed, pursuant to 12(b) FJQCR, that Judge Kelly submit to a psychiatric examination.[2] Formal charges, as amended, were filed in words and figures in part as follows:

• • •

"Pursuant to the provisions of Article 5, Section 17a of the Constitution of the State of Florida and the Rules of the Florida Qualifications Commission, as adopted by the Supreme Court of Florida, you are hereby notified of the institution of formal proceedings to inquire into the following charges against you:

"That you are guilty of conduct unbecoming a member of the Judiciary and that you have a mental or emotional disability seriously interfering with the performance of your duties as a Circuit Judge of the Sixth Judicial Circuit of Florida, which is, or is likely to become, permanent in nature, by:

"I

"Failing to cooperate with other Circuit Judges of the Sixth Judicial Circuit while Presiding Judge of said Circuit during the months of February, March and April, 1968, contrary to Canon Eight[3] of the

---

[2] Although there was no proceeding for the Circuit Judge to demand that a psychiatric examination be held, he did in fact demand and move for such an examination before the Commission.

[3] The following Canons of Judicial Ethics are referred to in the formal charges, as amended:

"8. Court Organization.

"A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiesence by reason of friendly association with him.

"It is desirable too, where the judicial system permits *that he should cooperate with other judges of the same court*, and in other courts, *as members of a single judicial system, to promote the more satisfactory administration of justice.*"

Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

"20. Influence of Decisions upon the Development of the Law.

"*A judge should be mindful that his duty is* the application of general law to particular instances, *that ours is a government of law and not of men*, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. *He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depositary of arbitrary power, but a judge and r the sanction of law.*"

"21. Idiosyncrasies and Inconsistences.

"Justice should not be moulded by the individual idiosyncrasies of those who administer it. *A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgment, or spectacular or sensational in the conduct of the court.* Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

"In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency."

"23. Legislation.

"*A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice;* and to ascertain whether they tend to impede the unjust disposition of controversies; *and he may well contribute to the public interest by advising those having authority to remedy defects of procedure*, of the result of his observation and experience."

"34. A summary of Judicial Obligation.

"In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, *nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.*" (emphases added)

"II

"Attempting to seek alleged change in Court procedures, in a manner contrary to Canons Eight, Twenty and Twenty-three[3] of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

"III

"Seeking publicity with the intent to embarrass the other judges of the Sixth Judicial Circuit by filing a petition with the Clerk of the Circuit Court of Pinellas County, Florida, on April 8, 1968, a copy of which is attached hereto as Exhibit A, without prior thereto affording the other judges of said circuit an opportunity to consider the contents of said petition, but by appraising members of the press of the contents of the petition prior to filing the same, contrary to Canons Eight and Twenty-one[3] of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

* * *

"V

"Using the office of Circuit Judge of the Sixth Judicial Circuit for the purpose of advancing your personal ambitions and publicity to the detriment or embarrassment of your fellow Circuit Judges of the Sixth Judicial Circuit contrary to Canons Eight, Twenty-one, Twenty-three and Thirty-four[3] of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

* * *

"VII

"Conduct leading to the disrespect for, and the lowering of, the image of the court.

* * *

"X

"Embarrassing another Judge of the Sixth Judicial Circuit by summoning a Grand Jury already charged by such judge and recharging them as to their duties."

• • •

These were met by an answer denying each and every allegation of the formal charges, as amended, raising the defense of lack of jurisdiction over the subject matter; alleging that the Commission failed to abide by the rules adopted by the Supreme Court of Florida; that the Commission was illegally constituted; and that the proceedings violated certain constitutional rights of the respondent, Judge Kelly, accorded him under the Declaration of Rights of the Constitution of the State of Florida and the Bill of Rights of the Constitution of the United States.

Notwithstanding the order of the Commission to submit to a psychiatric examination and notwithstanding the demand and agreement by Judge Kelly for such an examination, he did, on March 5, 1969, decline to submit to an examination by the Commission-appointed psychiatrist.[4]

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[4] At the time of the resumed hearing, Judge Kelly attempted to offer evidence of medical doctors as to his mental condition, but this evidence was rejected because of his failure to submit to psychiatric examination ordered by the Commission. It was recognized that he had the right to decline, pursuant to 12(b) FJQCR, and this fact could be taken into consideration in the Commission's deliberations. The effect of his failure to submit to an examination and the Commission's ruling that he could not offer expert medical testimony on this subject was to limit the record to lay testimony as to his mental condition, in accordance with general Florida authorities. See: 13 Fla. Jur., Evidence, § 329; Redfearn, Wills and Administration in Florida, 4th Ed. Vol. 1, § 4.18, p. 78, and § 10.23, p. 206; Armstrong v. State, 30 Fla. 170, 11 So. 618; Norman v. State, Fla. App. 1963, 156 So.2d 186; Byrd v. State, Fla. App. 1965, 178 So.2d 886; Brady v. State, Fla. App. 1966, 190 So.2d 607; 72 A. L. R., p. 579; 40 A. L. R. 2d, p. 22.

The Commission resumed its hearings on March 10, 1969. Judge Kelly took the stand in his own defense. The proceedings terminated on March 13, 1969. The Commission heard from ninety-seven witnesses and received a number of exhibits. The transcript of testimony was completed and delivered to the Commission on Monday, April 21, 1969, and consisted of 1456 pages. It has now been reviewed by the members of the Commission and, together with the exhibits and the Commission's file on this matter, it is herewith filed as an addendum to this Report.

FINDINGS OF FACT AND CONCLUSIONS

As indicated above, Judge Kelly was charged with "conduct unbecoming a member of the judiciary" and that he was "suffering from a mental or emotional disability seriously interfering with his performance as a circuit judge". It is unfortunate, both for him and the people of the State of Florida, that Judge Kelly was unwilling to submit to an examination by qualified psychiatrists,[5] in order that the Commission could have finally put at rest this vexatious charge. However, there is not sufficient evidence in this record to support a finding that Judge Kelly has a mental or emotional disability that seriously interferes with his conduct as a circuit judge.

As to the charge of "conduct unbecoming a member of the judiciary", the Commission finds sufficient evidence to support the specific allegations contained in Paragraphs I, II, III, V, and VII of the formal charges, and finds insufficient evidence to support the charges contained in the other numbered paragraphs of the specific allegations, except as to Paragraph X. As to the specific charge of conduct unbecoming a member of the judiciary, relating to the re-charging of a Grand Jury under the supervision of another Circuit Judge, we find

---

[5] No attack was made on the competency of the medical experts appointed by the Commission and, in fact, they were both Board Certified Psychiatrists in accordance with the rules and regulations of the American Medical Association.

the evidence more than sufficient to support this charge. But, this event occurred prior to the adoption of the Amendment to the Constitution which created the Judicial Qualifications Commission and, therefore, the Commission finds it is without jurisdiction of this charge. No further reference will be made to the specific allegations wherein a finding of insufficient evidence to support the charges has been noted or wherein the Commission finds it is without jurisdiction.

As to those specifics wherein we find the evidence is sufficient to support the charges as numbered above (except X), the evidence adduced before the Commission reveals the following: That on February 13, 1968, the Judges of the Sixth Judicial Circuit elected Richard A. Kelly as Presiding Circuit Judge, pursuant to Rule 1.020, Florida Rules of Civil Procedure. He immediately engaged in a course of conduct calculated to disrupt the activities of the Circuit by proceeding to propose changes in the method by which criminal prosecutions were handled in the Circuit; by averring that certain Judges of the Circuit were not working, particularly those in the south end of the County (Pinellas); by ordering one of the Judges to duty in Pasco County for ninety days, even though said Judge resided in St. Petersburg, Pinellas County; by indicating that he was going to transfer all domestic relations cases to one particular Judge of the Circuit; proposed eliminating Special Masters in uncontested divorce cases; and ordered the official court reporter to report all justice of the peace hearings upon call of the Public Defender of Pinellas County; and generally created turmoil, confusion, and chaos within the Circuit. As a result, a majority of the other Judges of the Circuit determined to remove or recall him as Presiding Judge in March of 1968. He was notified of this sentiment and determination of a majority of his fellow Judges on March 19, 1968.

Judge Kelly first requested the Judges to refrain from removing or recalling him, assuring them that if

they would leave him with the title of Presiding Judge he would return to Pasco County[6] and not interfere with the running of the Circuit Court at Pinellas County nor propose any court reforms. When this offer was unacceptable, he requested and was granted a week's reprieve in order that he might tender a resignation as Presiding Judge. It was thought he might be a candidate for another judicial office, and this would give him an excuse to resign. When the week was up, a majority of the Circuit Judges again met with Judge Kelly to consider his recall as Presiding Judge, at which time he polled each member there present; determined that they were still for removing him as Presiding Judge. Thereupon he announced his resignation, and threatened those in attendance that they would regret their actions; that he would cause them embarrassment and get back at them. He then left the meeting. Some several days later, he arranged an appointment with the editor and certain personnel of a local newspaper in St. Petersburg, to enlighten them about a petition proposing certain alleged judicial reforms he intended to file. Subsequently, on April 5, 1968, he filed what was styled "Petition to the Judges of the Sixth Judicial Circuit in the Circuit Court of Pinellas County", containing alleged court reforms and criticism of court administration, prior to having afforded his fellow Judges an opportunity to see or examine the contents thereof.[7] The filing of said

---

[6] Judge Kelly originally ran for the position of Judge of the Sixth Judicial Circuit as the resident Judge in Pasco County, pursuant to the provisions of § 26.071, Fla. Stat. At the time of the election and at all times since then he has been a resident of Pasco County, and has admitted in his testimony that the volume of work in Pasco County is now sufficient to require the full time attention of one Circuit Judge. The Sixth Judicial Circuit has, at this time, twelve judges to tend to the duties within the Circuit, which consists of Pinellas and Pasco Counties. The bulk of the work within the Circuit is generated within Pinellas County.

[7] This petition, together with its exhibits, consisting of 57 pages, was attached to the formal charges as amended, as Exhibit A, and was introduced into evidence as a Commission exhibit.

petition without prior thereto exhibiting it or calling it to the attention of his fellow Judges evidenced a lack of cooperation, disrespect of his obligation as a member of the judiciary, was calculated to embarrass his fellow Judges, brought disrespect upon the jundiciary, and was an attempt to seek court reform not in the usual or normal manner. Further, the petition was filed for the purpose not of improving the administration of justice in the Sixth Judicial Circuit but was filed not only to spite his fellow Judges but for the purpose of advancing his own personal ambition and publicity, to the detriment and embarrassment of the remaing members of the Circuit bench.

If Judge Kelly had been solely interested in the internal court reform of the Sixth Judicial Circuit, he of all judges was well aware of the appropriate procedure to follow in obtaining the rules he desired. In the early 1960's a majority of the Judges of the Sixth Judicial Circuit proposed certain local rules for approval to the Supreme Court of Florida, Judge Kelly did not agree with the rules as proposed by the majority of the Judges of the Circuit. He filed a petition to this effect before the Supreme Court which petition, in part, was granted and certain of the rules advocated by him were ultimately adopted by the Supreme Court.[8]

The publicity incidental to the filing of this petition did bring the Sixth Judicial Circuit into disrepute and, as testified to, it was known as the "sick" Circuit. Certainly the public has a right to know of the affairs of its judicial system and our finding is not a criticism of the public's right to know of the court's operation. Our finding is that Judge Kelly failed to follow recognized

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[8] Subsequent to the filing of the petition in April of 1968, the remaining Judges of the Sixth Judicial Circuit considered the proposed rule changes recommended by Judge Kelly, finding some merit in certain of them. They have now proposed new local rules to the Supreme Court of Florida, and Judge Kelly will once again have an opportunity to present his views if they differ from the majority.

methods of proposing changes in judicial procedure, that he did not afford them an opportunity to be aware of his charges and the contents of the petition or give them an opportunity for consideration thereof prior to filing. Rather, he was more interested in creating controversy and in publicity for himself than in accomplishing court reform.[9]

It is our conclusion that said conduct and activities violated Canons 8, 20, 21, 23, and 34 of the Canons of Judicial Ethics as adopted by the Supreme Court of Florida.

RECOMMENDATIONS

Therefore, having found and concluded that said Richard A. Kelly, Circuit Judge of the Sixth Judicial Circuit, has engaged in conduct unbecoming a member of the judiciary, it is the recommendation of the Commission that the said Richard A. Kelly be called before the Supreme Court of Florida at a time certain to be publicly reprimanded for said conduct and admonished to comply with his oath as a member of the Judiciary, and to abide by the Canons of Judicial Ethics as a member of the Judiciary, particularly in:

(a) Cooperating with his fellow Judges;

(b) Following the normal method for seeking procedural changes as to the administration of justice in the Sixth Judicial Circuit;

(c) Refraining from seeking personal publicity or attempting to advance his personal ambitions through the public information media; and

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[9] It is not the function of the Commission to determine the merit or wisdom of the proposed reforms as set up by Judge Kelly. The proper forum for this determination is ultimately before the Supreme Court of Florida. This Commission's Report is not intended to reflect on the wisdom or lack of wisdom of any of the proposed procedural changes recommended in the petition.

(d) In accordance with his admission that there is sufficient work in Pasco County to keep him occupied on a full time basis, that he discharge the duties of a resident Circuit Judge of Pasco County in and for the Sixth Judicial Circuit, and refrain from service in Pinellas County of the Sixth Judicial Circuit, unless assigned by the Presiding Judge of said Circuit to duty in Pinellas County pursuant to Rule 1.020(c) (4), Florida Rules of Civil Procedure.

It is further the recommendation of the Commission that the ultimate action by the Supreme Court in these proceedings shall be without prejudice to the entire record of this inquiry being introduced into evidence in any subsequent inquiry which may be brought before the Judicial Qualifications Commission concerning Judge Richard A. Kelly.

Respectfully submitted,

FLORIDA JUDICIAL
QUALIFICATIONS COMMISSION
/s/ JOHN S. RAWLS, Chairman
/s/ PAUL D. ADAMS
/s/ THOMAS H. BARKDULL, JR.
/s/ ROBERT GOLDTHWAITE
/s/ MARK HULSEY, JR.
/s/ CHARLES A. KIMBRELL
/s/ GILMER A. MACDOUGALD
/s/ WOODROW M. MELVIN
/s/ JAMES S. MOODY

I, JOHN S. RAWLS, Chairman of the Judicial Qualifications Commission of Florida, hereby certify as follows:

1. That the above and foregoing Report reflects the unanimous action of the entire Membership of the Judicial Qualifications Commission in connection with this Inquiry, and that same is filed in accordance with the requirements of 23 FJQCR.

2. That I have this 7th day of May, 1969, furnished a copy of the above and foregoing report to Counsel for the Commission, William D. Hopkins of Hopkins, Folsom and Steinmeyer, Lewis State Bank Building, Tallahassee, Florida; to Judge Richard A. Kelly, Route 2, Box 225-A, Zephyrhills, Florida; and to Counsel for Judge Richard A. Kelly, Michael L. Kinney of Fowler, White, Collins, Gillen, Humkey and Trenam, 712 Florida Office Building, St. Petersburg, Florida, and Masterson, Lloyd, Sundberg & Rogers, 447 Third Avenue North, St. Petersburg, Florida.

/s/ JOHN S. RAWLS

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE :

NO. 1 :

PETITION TO THE SUPREME COURT

Petitioner, JUDGE RICHARD KELLY, pursuant to the provisions of Rule 24(a), Florida Judicial Qualifications Commissions Rules, files this his verified petition to the Supreme Court to reject the recommendations, findings and conclusions of the Florida Judicial Qualifications Commission in the particulars and upon the grounds enumerated herein.

Hereinafter the Florida Judicial Qualifications Commission will be referred to as "the Commission". References to the record herein will be by the letter "R", referencing thereby a COPY OF RECORD OF PROCEEDINGS BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION served upon petitioner's counsel on May 7, 1969. References to the transcript of proceedings before the Commission will be by the letter "T" and date of the proceeding.

Petitioner was advised on June 26, 1968, that the Commission, upon its own motion, was investigating his conduct (R-2, 3 and 4). The Commission met on July 11, 1968, in St. Petersburg, at which time testimony was taken from judges of the Sixth Judicial Circuit. Petitioner, at that time, personally made a sworn statement to the Commission (T-July 11, 1968, page 222).

Thereafter, petitioner made a written demand in accordance with Rule 29(c) F.J.Q.C.R., that the Commission either institute formal proceedings against him or enter a formal finding that there was no probable cause to believe that petitioner was guilty of any misconduct. This demand was filed on August 19, 1968 (R-5).

The Commission, on November 8, 1968, nineteen (19) days beyond the time prescribed by Rule 29(c), F.J.Q.C.R., served petitioner with a notice of formal proceedings containing ten (10) charges of misconduct against petitioner (R-8 through 19). Petitioner was charged, in summary, with (1) failing to cooperate with other judges in his circuit, contrary to Canon 8 of the Canons of Judicial Ethics; (2) attempting to seek reforms in a manner contrary to Canons 8, 20 and 23; (3) seeking publicity in order to embarrass other judges in the circuit by filing a petition for court reform after conferring with the press about the petition without giving the other judges the opportunity to consider the contents thereof, contrary to Canons 8 and 21; (4) by filing the petition referenced in (3) above when the petition contained inaccurate statements; (5) using his position as a Circuit Judge to advance his personal ambitions, contrary to Canons 8, 21, 23 and 24; (6) creating turmoil by criticising other judges and court personnel; (7) conduct leading to disrespect for, and the lowering of, the image of the court; (8) failing to be considerate of counsel and others in court, contrary to Canons 9 and 10; (9) misleading other judges regarding his willingness to resign as presiding judge; (10) embarrassing another judge by recharging a Grand Jury. Two additional charges were added by amendment during the trial (after which amendment, a recess from January 29, 1969 to March 10, 1969 was taken). The amendment (R-58, 59) charged petitioner with having a mental or emotional disability seriously interfering with the performance of his judicial duties in that, (11) his conduct was irrational and (12) he constantly created turmoil and confusion.

In response to the charges, the petitioner filed a motion to dismiss, contending therein that the Commission was without jurisdiction to pursue the subject matter of the charges any further against him (R-25 and 26), because of the Commission's failure to institute formal proceedings or to enter a formal finding that

there was not probable cause to believe that petitioner had been guilty of any misconduct within the sixty (60) days provided by Section 29(c), F.J.Q.C.R. Petitioner also contended at that time that the Commission was without jurisdiction to proceed against him in that the Commission had failed to file charges with the particularity specified by Rules 25, 29(c) and 9(d), F.J.Q.C.R. It was also contended by petitioner that the charges set forth in Section VI, VII, VIII, IX and X had not been presented to him during the investigation by the Commission, thereby denying petitioner the opportunity to respond to those charges, a right which was preserved to him by Rule 8(b), F.J.Q.C.R.

In this same motion to dismiss, petitioner further contended that the Commission was illegally constituted and that the manner in which the Commission was proceeding against him constituted a denial of rights assured petitioner by the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the Declaration of Rights of the State of Florida, Section 2, 12 and 13.

The aforesaid motion, filed by petitioner, was stricken, ex mero motu, by the Commission on December 8, 1968, upon the ground that the rules of the Commission did not provide for any such motion (R-28)

Following disposition of the aforesaid motion, petitioner filed his answer and defenses (R-30, 31 and 32). Petitioner denied the charges against him and again asserted that the Commission was without jurisdiction to proceed in the matter, raising therein the matters urged in the motion to dismiss. Following the answer, petitioner moved for an order requiring the Commissioner to amend the charges to achieve compliance with Rule 9(b), F.J.Q.C.R., or, in the alternative, for a full bill of particulars advising petitioner of the nature of the charges filed against him (R-34). This motion was denied (R-37). Petitioner then filed interrogatories and a motion to shorten the time within which the interrogatories should be answered (R-40 through 49 and R-38). The motion to shorten time was denied (R-51).

Petitioner thereafter sought relief in the form of a suggestion for a writ of prohibition or certiorari, in the alternative, from the Florida Supreme Court. Petitioner's application therefor was denied by this Court on January 20, 1969.

Hearings on the charges against petitioner commenced on January 29, 1969, in the County Court House in Dade City, Pasco County. These hearings were recessed following testimony for several days to March 10, 1969. Hearings were resumed on March 10, 1969, and and were concluded on March 13, 1969.

The Commission's report containing findings of fact, conclusions and recommendations was filed with the Florida Supreme Court on May 7, 1969 (R-101 through 117). This petition was thereafter timely filed.

In the recommendations of the Commission and findings of fact, the Commission found petitioner guilty of conduct unbecoming a member of the judiciary on charges I, II, III, V and VII, which were (I) failing to cooperate with other judges in the circuit, contrary to Canon 8 of the Canons of Judicial Ethics; (II) attempting to seek court changes in a manner contrary to Canons 8, 20 and 23; (III) seeking publicity in order to embarrass the other judges in the circuit by filing a petition for court reform after talking with the press but before giving the other judges the opportunity to consider the contents thereof, contrary to Canons 8 and 21; (V) using the office of circuit judge to advance his personal ambitions contrary to Canons 8, 21, 23 and 24; and (VII) conduct leading to disrespect for, and the lowering of, the image of the Court (R-110).

Petitioner was acquitted on the balance of the charges, including charge X relating to recharging of the Grand Jury. In respect to charge X, the Commission found that it was without jurisdiction because that conduct had occurred prior to the adoption of the constitutional amendment creating the Commission.

The Commission recommended discipline in the form of a public reprimand without prejudice to reconsideration of the entire matter in some subsequent inquiry.

Petitioner herein petitions this Court to (1) reject the recommendations of the Commission; (2) reject the findings of sufficient evidence to sustain charges I, II, III, V and VII; and (3) reject the references in the Commission's report to the alleged emotional or mental disability of petitioner beyond a simple finding of acquittal thereon, all for the reasons enumerated herein and in the brief to follow this petition.

DISCUSSION

1. The recommendations of the Commission and the findings upon which said recommendations purport to be based are not supported by competent evidence and the following findings should be rejected:

A. That petitioner, upon being elected presiding circuit judge on February 13, 1968, engaged in a course of conduct calculated to disrupt the activities of the circuit by proceeding:

(1) To propose changes in the method by which criminal prosecutions were handled in the circuit.

(2) By averring that certain judges of the circuit were not working, particularly those in the South end of the County (Pinellas).

(3) By ordering one of the judges to duty in Pasco County for ninety days, even though said judge resided in St. Petersburg, Pinellas County.

(4) By indicating that he was going to transfer all domestic relations cases to one particular judge of the circuit.

(5) Proposed eliminating special masters in uncontested divorce cases.

(6) Ordered the Official Court Reporter to report all justice of the peace hearings upon call of the Public Defender of Pinellas County.

(7) Generally created turmoil, confusion and chaos within the circuit (R-111).

B. That upon hearing of the desire of a majority of the judges in the circuit to request that he resign as presiding judge, petitioner first requested the judges to refrain from removing or recalling him, assuring them that if they would leave him with the title of presiding judge, he would return to Pasco County and not interfere with the running of the Circuit Court at Pinellas County nor propose any court reforms (R-112).

C. That petitioner, upon announcing his resignation as presiding judge, threatened those in attendance that they would regret their actions; that he would cause them embarrassment and get back at them (R-112).

D. That petitioner did not afford his fellow judges an opportunity to see or examine the petition which was filed on April 5, 1968 (R-112; R-113).

E. That the filing of said petition without prior thereto exhibiting it or calling it to the attention of his fellow judges evidenced a lack of cooperation, disrespect of his obligation as a member of the judiciary, was calculated to embarrass his fellow judges, brought disrespect upon the judiciary and was an attempt to seek court reform, not in the usual nor normal manner (R-113).

F. That the petition was filed for the purpose not of improving the administration of justice in the Sixth Judicial Circuit, but was filed not only to spite his fellow judges but for the purpose of advancing his own personal ambition and publicity, to the detriment and embarrassment of the remaining members of the circuit bench (R-113).

G. That the publicity incidental to the filing of this petition brought the Sixth Judicial Circuit into disrepute and the circuit was known as the "Sick" Circuit (R-114).

H. That petitioner failed to follow recognized methods of proposing changes in judicial procedure; that he failed to cooperate with his fellow judges in that he did not afford them an opportunity to be aware of his charges and the contents of the petition or give them the opportunity for consideration thereto prior to filing (R-114).

I. That petitioner was more interested in creating controversy and publicity for himself than in accomplishing court reform.

J. That petitioner violated Canons 8, 20, 21, 23 and 24 of the Canons of Judicial Ethics as adopted by the Supreme Court of Florida (R-114).

2. Petitioner has been denied due process of law guaranteed him by the Constitution of the United States and the State of Florida in the proceedings below in that the Commission failed to follow the rules of procedure promulgated by the Florida Supreme Court to the prejudice of petitioner in that:

A. In violation of Rules 25 and 29(c), F.J.Q.C.R., the Commission failed, within Sixty (60) days of the filing by petitioner of a written demand in the manner specified by Section 29(c),

F.J.Q.C.R., to institute formal proceedings or to enter a formal finding that there was not probable cause to believe that petitioner was guilty of any misconduct. As a result thereof, the Commission was without jurisdiction, upon the expiration of said sixty-day period, to proceed further against petitioner.

B. In violation of Rules 25, 29(c) and 9(b), F.J.Q.C.R., no charges of sufficient particularity specifying the facts relied upon in support thereof were timely filed or adequately pled in the proceeding below. As a result thereof, the Commission was without jurisdiction to proceed against respondent.

C. The Commission was without jurisdiction to proceed against petitioner in regard to the subject matter of Section VII in the charges filed against petitioner in that said charges were never presented to petitioner during the course of the investigatory proceedings, thereby denying to petitioner the opportunity to respond thereto, in violation of Rule 8(b), F.J.Q.C.R.

D. The procedure by which petitioner was investigated, tried and adjudged by the Commission violated the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the Constitution of the State of Florida, Declaration of Rights, Sections 2, 12 and 13 thereof.

E. The Commission was without jurisdiction to proceed against petitioner in that the Commission was illegally constituted in violation of Article V, Section 17A of the Florida Constitution.

3. Respondent has been denied due process of law guaranteed him by the Fourteenth Amendment of the Constitution of the United States and the Constitution of the State of Florida, Declaration of Rights, Sections 2, 12 and 13 thereof, in that:

A. The Commission was apprised of all facets and features of the investigation of petitioner prior to the hearing upon the merits of the charges against petitioner.

B. The Commission itself filed the accusation against petitioner.

C. The Commission was the prosecutor of the charges against petitioner.

D. The Commission was the adjudicator of all questions of evidence, fact and law at the hearing on the merits of the charges against petitioner.

4. Petitioner was denied due process of law guaranteed him by the Constitution of the United States and the Constitution of the State of Florida, Declaration of Rights, Sections 2, 12 and 13 thereof, in that:

A. Notwithstanding the express finding of the Commission that insufficient evidence existed to support the charge that petitioner had a mental or emotional disability seriously interfering with the performance of his duties as a circuit judge of the Sixth Judicial Circuit of Florida, which was or was likely to become permanent in nature, the Commission stated or implied (R-110) that this "vexatious" charge had not been put to rest by the hearing below.

B. Petitioner was unlawfully denied the right to present evidence of the examinations of petitioner by qualified psychiatrists (R-97, 98).

5. Petitioner was denied due process of law guaranteed him by the Constitution of the United States and the Constitution of the State of Florida, Declaration of Rights, Sections 2, 12 and 13, in that petitioner was deprived of a fair trial because the Commission considered conduct and events which transpired and occurred,

A. prior to the impeachment trial of petitioner;

B. prior to the adoption by the people of the State of Florida of Article V, Section 17A of the Florida Constitution;

C. prior to the general election of November of 1968, at which time petitioner was reelected to the office of judge of the Sixth Judicial Circuit.

6. Petitioner was denied due process of law guaranteed him by the Constitution of the United States and the Constitution of the State of Florida, Declaration of Rights, Sections 2, 12 and 13 thereof, in that petitioner was deprived of a fair trial by virtue of the cumulative effect of the errors committed by the Commission below.

MASTERSON, LLOYD, SUNDBERG & ROGERS
447 3rd Avenue North
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and
FOWLER, WHITE, COLLINS, GILLEN, HUMKEY & TRENAM
Post Office Box 1438
Tampa, Florida 33601

Attorneys for Petitioner

By /s/ MICHAEL L. KINNEY

VERIFICATION

STATE OF FLORIDA)
) ss.
COUNTY OF HILLSBOROUGH)

RICHARD KELLY deposes and says that the facts and matters in the foregoing petition are true.

/s/ RICHARD KELLY

Sworn to and subscribed before me this 4th day of June, 1969.

Notary Public

My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition to the Supreme Court has been furnished, by mail, to John S. Rawls, Chairman of the Florida Judicial Qualifications Commission, Supreme Court Building, Tallahassee, Florida, and to William D. Hopkins, counsel for the Florida Judicial Qualifications Commission, Leon County Courthouse, Tallahassee, Florida, this _____ day of June, 1969.

Attorney

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D., 1970

INQUIRY CONCERNING A JUDGE NO. 1

Richard A. Kelly, Circuit Judge

Case No: 38,595

PETITION FOR REHEARING

Comes now the Petitioner, pursuant to Rule 3.14, Florida Appellate Rules, and files this his Petition for Rehearing addressed to this Court's majority opinion in this cause filed June 17, 1970.

In keeping with the terms of Rule 3.14, the purpose of this Petition is to set forth those items of apparent oversight and omission which we respectfully submit are reflected in the majority opinion to which this Petition is directed. A conscientious effort is made herein to avoid reargument of those matters previously argued in briefs filed on behalf of Petitioner in this cause. The causes and grounds upon which this Petition is based are set forth in separately numbered paragraphs below:

1. This Court stated in its majority opinion (Slip Opinion, page 5) as follows:

> "The evidence is replete with instances in which the judicial temperament of petitioner was lacking. Nineteen of the approximately twenty-one lawyers of Pasco County were willing to, and did, sign a petition for the impeachment of Judge Kelly; seven lawyers left Dade City in Pasco County because of Judge Kelly; many cases ordinarily filed in Pasco County were filed out of the county because of Judge Kelly; attorneys and court personnel were fearful of Judge Kelly; he was rude and

inconsiderate of attorneys and court personnel. His erratic behavior culminated in the filing of the petition."

We respectfully submit that this portion of the Court's opinion may have resulted from the Court's oversight in two respects, each of profound importance.

(a) First, the record of the proceedings before the Commission in this cause reveals clearly that conduct and events occurring prior to the Petitioner's re-election to office were *not* to be considered by the Commission except as they might relate to the Petitioner's present mental competency. Early in the proceedings this was made clear by the Commission (TR. 504-507):

> MR. MASTERSON: May I go to the second point, sir? At the last meeting of the Commission I started to make an argument directed to whether or not the Commission could consider matters which had arisen prior to the formation of the Commission. The creation of the Commission. And the members of the Commission agreed with me, and it was unnecessary for me to argue that point. However, I don't believe anything is in the record at this point which discloses that.
>
> I respectfully request the Commission to make that clear in the record. That the only time that the Commission will go behind an event which occurred prior to the formation of the Commission will be for the purpose of determining the mental competency of the Respondent, Judge Kelly.
>
> CHAIRMAN: I believe you misconstrued or maybe misinterpreted the feeling of the Commission. It seems like the consensus of the Commission at its last meeting that the action was not tied, although dates are identical, that they are tied as to the formation of the Commission, but were tied to the re-election of Judge Kelly as far as specific acts.

That any matters and things pertaining to his mental condition, or which would bear upon his mental condition, occurring prior to his last election would be considered by the Commission, and that any evidence tending to bear upon that question would be received. But as far as specific acts of misconduct in office, assuming that he is sui juris, that those acts that were committed prior to his last election would not be considered by the Commission.

It will be the responsibility of the Commission to weed out this testimony, either on admissibility or upon final consideration of the matter.

If any member of the Commission feels that I haven't stated the consensus of the Commission I wish they would make their desires known.

JUDGE BARKDULL: I think I am the one that raised the question before. It is my reply in the colloquy we had that it is not my understanding that this Commission sought to discipline Judge Kelly for any misconduct or alleged misconduct that may have occurred prior to his present term of office, but they would make an inquiry as to whether witnesses had an opportunity to observe and see and be familiar with Judge Kelly prior to that time in order to base an opinion as to his competency.

That it was not the purpose of this Commission to discipline Judge Kelly for anything that might have occurred incident, or facts that might have occurred prior to his present term of office.

MR. MASTERSON: I wanted to get that in the record."

This matter was discussed later in the proceedings when, during Petitioner's examination by his own counsel, the following exchange occurred (TR. 1357-1358):

Q. Now, the House Managers conducted a rather thorough investigation, did they not, into your conduct as a trial Judge and as a Circuit Judge in preparation for your trial in the Senate?

A. If they missed anything I don't know what it was. They took an aerial photograph of my house.

Q. Well now, Judge, was there anything in the charges that were filed in the Senate —

CHAIRMAN: I notice that counsel is not objecting, but it would appear to me that this line of inquiry has been vigorously objected to by counsel and has been sustained by the Commission, unless it goes to his mental condition at that time. It doesn't have a thing to do with that subject matter.

MR. MASTERSON: The reason I am offering the testimony is to show that, first of all, there was precedent for filing of this Petition.

CHAIRMAN: Yes, sir.

MR. MASTERSON: And at a time when he was being exhaustively researched for some impropriety that this matter must have come to the attention of people investigating him, and they did not find it improper.

JUDGE RAWLS: He was being investigated for an entirely different offense than which he is being charged here. And the members of this body know it, and we have gone back and forth over that. I am just speaking as one member of the Commission. I don't see any reason for any further inquiry."

And, of utmost significance in this regard, is the fact that the Commission expressly found that "there is not sufficient evidence in this record to support a

finding that Judge Kelly has a mental or emotional disability that seriously interferes with his conduct as a circuit judge". (See: "Report of the Judicial Qualifications Commission, page 7, R. 110).

Thus, this Court in its majority opinion expressly predicates its approval of the Commission's recommendations upon evidence wholly unrelated to any charge or allegation as to which the Commission found the evidence sufficient or which survived the Commission's scrutiny and findings. In other words, this Court has approved the legality of the Commission's particular findings which were adverse to Petitioner upon the basis of evidence which was concededly unrelated to those charges.

In sum, the factual assertions stated in the above-quoted portion of this Court's opinion are based upon evidence which it was agreed would not be used to support any charge of which Petitioner was convicted by the Commission. Clearly, the Commission was correct in refusing to consider specific acts of alleged misconduct in office occurring prior to Petitioner's re-election for any purpose other than mental competence. The Commission correctly acknowledged that it was not its function to second-guess the electorate.[1]

Furthermore, it is of utmost importance that the very limited evidentiary purpose of pre-election conduct be studiously recognized and honored here. As shown in the above-quoted colloquy from the transcript (TR. 1357-1358), Petitioner was not allowed to explore pre-election events to establish the propriety of filing the Petition in the Circuit Court.

We respectfully submit that the limitations established below regarding the purpose of this evidence were correct and should be binding here. Therefore, we

[1] "No rule is better settled under our democratic theory than this; when one is re-elected or re-appointed to an office or position he is not subject to removal for offenses previously committed." *Rosenfelder* v. *Huttoe*, 24 So.2d 108, 110 (Fla. 1946).

submit that this Court should not consult or utilize that evidence in any way in reviewing or approving the charges of which Petitioner was convicted by the Commission.

(b) Further, the above-quoted portion of this Court's opinion states that Petitioner "was rude and inconsiderate of attorneys and Court personnel." This was the gravamen of the formal charge contained in Paragraph VIII which read as follows:

> "Failing to be considerate of, and courteous to, counsel and others in attendance upon the court, contrary to Canons Nine and Ten of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida."

Again, the Commission found the evidence as to this charge "insufficient". (See: "Report of the Judicial Qualifications Commission, page 7; R. 110). Thus, we respectfully submit that this Court overlooked the fact that the Commission, which heard and observed the witnesses, rejected this charge.

In sum, we respectfully submit that this Court has, inadvertently and through oversight, based its approval of the Commission's recommendations upon (1) evidence which is not legally relevant to any issue here and upon (2) an erroneous impression that the Commission had found Petitioner guilty of the "rudeness" charge.

2. This Court stated in its majority opinion (Slip Opinion, page 4) as follows:

> "Apparently, for the purpose of seeking favorable publicity for himself, petitioner misrepresented the facts in this petition regarding his removal as presiding judge when he said:
>
> > "This Petitioner has resigned a position he coveted to remove any possibility of personality and vanity as a consideration in the discharging of this obligation."

We respectfully submit that in making this finding this Court may have overlooked the fact that this Court had before it no such finding by the Commission. The "Report of the Judicial Qualifications Commission" in this cause (R. 110) found the evidence insufficient to support the charges contained in Paragraphs IV, VI, VIII and IX of the formal charges. The charges contained in Paragraphs IV and IX were as follows:

IV

"Seeking to embarrass the other judges of the Sixth Judicial Circuit by filing a petition with the Clerk of the Circuit Court of Pinellas County, Florida, on April 8, 1968, without prior thereto affording the other judges of said circuit an opportunity to consider the contents of said petition, but by appraising members of the press of the contents of the petition prior to filing the same, which petition contained inaccurate factual information contrary to Canons Eight and Twenty-one of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

IX

"Misleading the other judges of the Sixth Judicial Circuit regarding your willingness to resign as presiding judge in order to preclude your removal as presiding judge of the Sixth Judicial Circuit."

Thus the Commission found the evidence insufficient to support the charges alleging that the Petition contained inaccurate statements and that Petitioner misled the other judges in regard to his resignation. Moreover, there is no allegation or charge of "misrepresentation" or "inaccuracy" in the charges concerning which the Commission found the evidence sufficient, i.e., Paragraphs I, II, III, V and VII.

Thus, we respectfully submit that this Court has, by reason of inadvertence and oversight, gone beyond

the scope of the Commission's findings and recommendations and inadvertently resurrected a charge as to which the Commission found the evidence wanting. In doing so, we respectfully submit, this Court has made a basic factual determination from a cold written transcript. On the contrary, the Commission, which heard and observed the witnesses, expressly rejected this finding.

3. The remaining findings of fact adverse to Petitioner relate almost entirely to the filing by Petitioner of his Petition in the office of the Clerk of the Circuit Court. We respectfully submit that, in filing the Petition, Petitioner was necessarily exercising his constitutionally protected right to freedom of speech. As demonstrated in our Brief filed herein and as found by Chief Justice Ervin, in the minority opinion of this Court, Petitioner "followed the tradition of free citizens" (Slip Opinion, page 18) by making public his views and suggestions relating to improved administration of the courts of the Sixth Circuit.

We respectfully submit that the majority opinion of this Court may have inadvertently omitted or overlooked consideration of the silencing effect the majority decision may have upon judges throughout the state. Further, the right of a citizen to publish constructive criticism of our judicial system is no less constitutionally protected because the citizen is a judge. Indeed, a free people cannot be effectively informed of the operation of the judiciary unless judges are free to make their views known to the people. In this light, we respectfully submit that the following statement by the United States Supreme Court is worthy of note:

> "Speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1965).

WHEREFORE, Petitioner respectfully requests that the Court grant a rehearing and, upon reconsidera-

tion, Petitioner requests that the report and recommendations of the Commission be rejected.

Respectfully submitted,
MASTERSON, LLOYD, SUNDBERG & ROGERS
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and
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By: Bernard J. Masterson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been furnished by mail to the Honorable William Hopkins, attorney form the Florida Judicial Qualifications Commission, Supreme Court Building, Tallahassee, Florida 32302 and that two copies thereof have been furnished by mail to the Florida Judicial Qualifications Commission, to the attention of the Honorable John S. Rawls, Supreme Court Building, Tallahassee, Florida 32302 this 30th day of June, 1970.

Attorney

FLORIDA CONSTITUTION

§ 17A. Discipline, retirement and removal of justices and certain judges

(1) Except as it provides for mandatory retirement, this section shall apply to every justice of the supreme court and judge of the district courts of appeal and circuit courts. It shall be the sole method of disciplining, automatically or involuntarily retiring or removing such justices or judges, provided that all such justices or judges shall be liable to impeachment for any misdemeanor in office. All justices and judges shall automatically retire at age seventy (70) except those who

hold any judicial office on July 1, 1957; provided, however, that such mandatory retirement shall not prohibit a justice or judge from serving the entire term to which he was appointed or elected if he attains his seventieth birthday after serving at least one-half of such term.

(2) There shall be a judicial qualifications commission composed of:

(a) Two (2) judges of the district courts of appeal appointed by the judges of those courts and two (2) circuit court judges appointed by the judges of those courts.

(b) Two (2) members of The Florida Bar, who shall have practiced law in this state for at least eight (8) years, appointed by the board of governors of The Florida Bar; and

(c) Three (3) citizens, each of whom shall have been a resident of this state for at least five (5) years, neither of whom shall be a justice or judge of any court, active or retired, nor a member of The Florida Bar, appointed by the governor. When a member appointed under paragraph (a) ceases to be a judge of the court from which he was appointed or a member appointed under paragraph (b) ceases to be a member of The Florida Bar, or a member appointed under paragraph (c) becomes a justice or judge of any court or a member of The Florida Bar, his membership on the commission shall terminate and a successor shall be appointed for the remainder of his term. No member of the commission appointed under paragraphs (b) or (c) shall be eligible to succeed himself. Except as provided herein, no member of the commission shall hold a public office and no member shall hold office in a political party. The compensation and terms of office of members of the commission shall be fixed by law, provided that not more than one third (1/3) of the terms of the members

shall terminate in any two (2) year period. No recommendation of the commission to the supreme court shall be valid unless concurred in by two thirds (2/3) of its members. The commission shall elect one (1) of its members to serve as chairman.

(3) Any justice or judge to whom this section applies may be disciplined by private reprimand or removed from office for willful or persistent failure to perform his duties or habitual intemperance or conduct unbecoming a member of the judiciary or he may be involuntarily retired for disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature. After such investigation as it deems necessary, the judicial qualifications commission may conduct a hearing concerning the removal, discipline or retirement of a justice or judge or request the supreme court to appoint three (3) special referees, who shall be active or retired justices or judges of courts of record, to hear and take evidence in any such matter, and to report thereon to the commission. All hearings shall be held in the county in which the justice or judge involved resides. Testimony shall be under oath, administered by a member of the commission or a special referee, and subject to the penalties for perjury. If after hearing, or after considering the record and report of the referees, the commission finds good cause therefor, it shall recommend to the supreme court the removal, discipline or retirement of the justice or judge. The supreme court shall review the record of the proceedings on the law and facts and shall order removal, discipline or retirement, as it finds just and proper, or wholly reject the commission's recommendation. Upon an order for involuntary retirement for disability, the justice or judge shall thereby be retired at retirement pay to be fixed by law which as to a justice of the supreme court, judge of a district court of appeal or circuit judge shall not be less than two thirds (2/3) of his then compensation if he has served for ten (10) years or more as justice or judge of such court or courts. Upon an order for removal, the justice or judge shall thereby

be removed from office, and his salary shall cease from the date of such order. The supreme court shall make rules providing for the procedure before the commission and the referees and the extent to which communications shall be privileged or confidential, provided that upon the entry of an order of discipline, removal or retirement the record shall no longer remain confidential. A justice or judge shall be disqualified in any proceeding involving his own discipline, retirement or removal. The supreme court shall by rule provide for the disqualification of any member of the commission or referee and for the ad hoc appointment of a person to take the place of a disqualified person.

(4) In the event a judge is removed from office, his judicial service shall not provide immunity from disciplinary proceedings for professional misconduct performed during his term of office or prior thereto.
Added, general election Nov. 8, 1966, eff. Nov. 9, 1966.

RULES OF JUDICIAL QUALIFICATIONS COMMISSION

Rule 8. INVESTIGATION

(a) The Commission, upon receiving a verified statement, not obviously unfounded or frivolous, alleging facts indicating that a judge is guilty of willful or persistent failure to perform his duties or habitual intemperance or conduct unbecoming a member of the judiciary or that he has a disability seriously interfering with the performance of his duties, which is, or is likely to become, permanent in nature, shall make such investigation as it deems necessary to determine whether formal proceedings should be instituted and a hearing held. The Commission without receiving a verified statement may make such investigation on its own motion.

(b) The judge has no right to be present or to be heard during an investigation, but before the Commission determines that there is sufficient cause to warrant formal proceedings, the judge shall be notified of the investigation, the nature of the charge, and the

name of the person making the verified statement, if any, or that the investigation is on the Commission's own motion, and, shall be afforded reasonable opportunity to make a statement, personally or by counsel, verbally or in writing, sworn or unsworn, explaining, refuting or admitting the alleged misconduct or disability. The judge shall not have the right to present other testimony or evidence, and he shall not have the right of confrontation or cross-examination of the person making the verified statement or any person interviewed, called or interrogated by the Commission. Such notification shall be given by registered or certified mail addressed to the judge at his chambers and at his last known residence.

(c) If the investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified.

(d) If the investigation does disclose sufficient cause to warrant further proceedings, the Commission shall designate one or more counsel who shall be members of The Florida Bar and who shall prepare appropriate papers and pleadings, gather and present evidence before the Commission or referees with respect to the charges against the judge, and otherwise act as counsel in connection with the prosecution of the charges against the judge including the representation of the Commission before the Supreme Court in connection with any proceedings before said court.

Rule 9. NOTICE OF FORMAL PROCEEDINGS

(a) After the investigation has been completed, if the Commission concludes that formal proceedings should be instituted it shall direct the counsel designated by the Commission without delay to give written notice to the judge advising him of the institution of formal proceedings to inquire into the charges against him. Such proceedings shall be entitled:

"BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

Inquiry Concerning a Judge, No. _____."

(b) The notice shall be issued in the name of the Commission and specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and shall advise the judge of his right to file a written answer to the charges against him within 20 days after service of the notice upon him. No charge shall be sufficient if it merely recites the general language of a charge in Rule 8(a) but must specify the facts relied upon to support a particular charge.

(c) The notice shall be served by the personal delivery of a copy thereof to the judge, but if it appears to the chairman of the Commission upon affidavit that, after reasonable effort for a period of 10 days, personal delivery could not be made, service may be made upon the judge by registered or certified mail addressed to the judge at his chambers and at his last known residence.

Rule 11. SETTING FOR HEARING BEFORE COMMISSION OR REFEREES

Upon the filing of an answer or upon the expiration of the time for its filing, the Commission shall order a hearing to be held before it concerning the discipline, retirement or removal of the judge, or shall request the Supreme Court to appoint three special referees who shall be active or retired justices or judges of courts of record to hear and take evidence in such matter and to report thereon to the Commission. The Commission shall set a time and a place in the county in which the judge involved resides for a hearing before itself or before the referees, and shall give notice of such hearing by mail to the judge, the referees and to the counsel at least 20 days prior to the date set.

Rule 12. HEARING

(a) At the time and place set for hearing, the Commission, or the referees when the hearing is before referees, may proceed with the hearing whether or not the judge has filed an answer or appears at the hearing.

(b) The failure of the judge to answer or to appear at the hearing, standing alone, shall not be taken as evidence of the truth of the facts alleged to constitute grounds for discipline, retirement or removal. In any proceeding for involuntary retirement for disability, the failure of the judge to testify in his own behalf or to submit to a medical examination requested by the Commission or the referees may be considered, unless it appears that such failure was due to circumstances beyond his control.

(c) The proceedings at the hearing shall be reported verbatim.

(d) When the hearing is before the Commission, not less than three members shall be present when the evidence is produced.

Rule 21. COMMISSION VOTE

If the Commission finds good cause, it shall recommend to the Supreme Court the discipline, retirement or removal of the judge. When the hearing was held before referees the affirmative vote of six members of the Commission is required for a recommendation of discipline, retirement or removal of a judge. When the hearing was held before the Commission without referees the affirmative vote of six members of the Commission, including a majority of those who were present at the hearing or hearings when the evidence was produced, is required for a recommendation of discipline, retirement or removal of a judge.

Rule 22. RECORD OF COMMISSION PROCEEDINGS

The Commission shall keep a record of all formal proceedings concerning a judge. The Commission's determination shall be entered in the record and notice thereof shall be mailed to the judge and to the counsel. In all formal proceedings resulting in a recommendation to the Supreme Court for discipline, retirement or removal, the Commission shall prepare a transcript of the evidence and of all proceedings therein and shall make written findings of fact and conclusions of law with respect to the issues of fact and law in the proceedings.

Rule 23. CERTIFICATION OF COMMISSION RECOMMENDATION TO SUPREME COURT

Upon making a determination recommending the discipline, retirement or removal of a judge, the Commission shall promptly file a copy of the recommendation certified by the chairman or secretary of the Commission, together with the transcript and the findings and conclusions, with the Clerk of the Supreme Court and shall promptly mail to the judge and to the counsel notice of such filing, together with a copy of such recommendation, findings, and conclusions.

JUDGE KELLY'S RESIGNATION

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA

On Tuesday after the first Monday of January, 1961, the dockets of this circuit were cluttered with thousands of cases that were not being administered and were a source of concern to the people involved. Some of them had been pending for fifty years. There were fifty-two appeals that had been pending for more than twenty years. The jail house was crowded with defendants awaiting disposition by the circuit court. One judge tried all of the criminal cases in Pinellas County and did not permit his fellow judges to participate in this portion of the court's work. This reached a peak when the constitutional authority of the other judges to hear petitions for writs of habeas corpus was stripped from them by a general order. Local rules were passed

by the judges in conference that were in conflict with the law and the best interests of the public. The implementation of these rules was opposed and the Supreme Court rejected them. Since then, the dockets have been cleared of approximately eleven thousand cases. All of the judges in the circuit share in the work of the court including the trial of criminal cases consistent with their obligation and the spirit of the law. Appeals to the circuit court are reasonably current. The number of persons waiting in jail for the action of the circuit court was reduced by seventy per cent. Each of these matters involved basic public interests, the integrity of the court and its service to the public. Each accomplishment has caused controversy. Recent developments in the law as it regards criminal cases imposed heretofore unknown burdens upon the courts and has greatly increased the costs of their operation. The true nature of this course toward a judicial utopia is not yet appreciated. There has always been a need for efficiency and good administration in the operation of our trial courts, however, the present condition causes this need to become urgent. The Sixth Circuit is in dire want of reorganization and administrative change. Many of its operations are inefficient and wasteful. It is not sufficiently responsive to the public need. My presence as presiding judge of this circuit is being used as an excuse for avoiding the responsibility of the judges to address themselves to the problems of the circuit. Believing as I do that it is not so important who serves the public interests as that the public interest be served, the question must arise as to whether my continuing as presiding judge is based upon vanity or a desire to serve. The course to be taken does not in any way suggest a lack of interest, concern or dedication but simply it is based upon the hope that this gesture will result in a constructive reappraisal and a future direction which is in the interest of the people served by this court.

THEREFORE:

I RESIGN AS PRESIDING JUDGE OF THE SIXTH JUDICIAL CIRCUIT effective this the 26th day of March, A.D. 1968.

RICHARD KELLY
Circuit Judge

SECOND NOTIFICATION OF INVESTIGATION

Honorable Richard A. Kelly
Route 2, Box 225-A
Zephyrhills, Florida

Pursuant to the provisions of Section 17A, Article V, Constitution of the State of Florida, and the Rules of the Florida Judicial Qualifications Commission as adopted by the Supreme Court of Florida (207 So. 2d 443), you are hereby notified that the Florida Judicial Qualifications Commission, on its own motion, is conducting an investigation of your alleged conduct as a Circuit Judge of the Sixth Judicial Circuit of the State of Florida, which may have been unbecoming a member of the judiciary, in February, March and April, 1968 by:

(a) Failure to cooperate with other circuit judges of the Sixth Judicial Circuit, while Presiding Judge of said circuit, during the months of February, March and April, 1968, contrary to Canon 8 of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

(b) Attempting to seek alleged change in court procedures, in a manner contrary to Canons 8, 20, and 23 of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

(c) Seeking publicity with the intent to embarrass the other judges of the Sixth Judicial Circuit, by filing a petition with the Clerk of the Circuit Court of Pinellas County, Florida, on April 8, 1968, without prior there-

to affording the other judges of the said circuit an opportunity to consider the contents of the said petition, contrary to Canons 8 and 21 of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

(d) Using the office of Circuit Judge of the Sixth Judicial Circuit for the purpose of advancing your personal ambitions and publicity, to the detriment or embarrassment of your fellow circuit judges of the Sixth Judicial Circuit, contrary to Canons 8, 21, 23, and 34 of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.

The Commission will meet at 2:30 o'clock P.M., on Monday, August 19, 1968, at the Pasco County Courthouse, Dade City, Florida. Pursuant to Rule 8(b) of the Rules of the Florida Judicial Qualifications Commission, you may at said time and place make a statement, personally or by counsel, verbally or in writing, sworn or unsworn, explaining, refuting, or admitting your conduct as above set out.

Very truly yours,

FLORIDA JUDICIAL QUALIFICATIONS COMMISSION
By
John S. Rawls, *Chairman*

EXHIBITS TO PETITION FILED BY JUDGE KELLY

PETITION FILED SEPTEMBER 7, 1962

PETITION

Comes now, RICHARD KELLY, as Circuit Judge of the Sixth Judicial Circuit and submits to his fellow Judges of this circuit for their approval a set of Proposed Rules for this circuit, a copy of which is attached to this Petition and made a part hereof.

The Rules are submitted to assist in a solution to the problems of administration of the circuit that have caused public controversy and to supplement existing rules in force.

The public controversy referred to was precipitated by the Order of the Presiding Judge dated December 13, 1961, as amended on the 28th day of December, 1961 (the Order and Amendment are attached hereto and made a part hereof) and press releases issued by the Presiding Judge in explanation of this Order.

Since December 13, 1961, two rules designed to accomplish the same purpose as the Presiding Judge's Order have been submitted to the Supreme Court for approval. The first was not approved and the second was disapproved and stricken by the Supreme Court.

The first rule was a verbatim adoption of the Presiding Judge's Order dated December 13, 1961 as amended and was approved by the Judges of this Circuit in conference by a vote of five to three. The second Rule submitted to the Supreme Court read as follows:

I. DIVISIONS OF THE COURT.

There shall be a Criminal Division and a Civil Division of the Court. Each such division shall have a chairman to be appointed by the presiding Judge, with power of self-appointment.

This Rule was passed by the Judges of this circuit in conference by a vote of seven to one.

This Petitioner was the only Judge of this circuit filing a dissent and who petitioned for disapproval with the Supreme Court as to both of the submitted Rules.

The Petitioner's dissent and opposition to this Order and these two Rules is based upon the fact that such a system for the distribution of the work of the circuit is impractical resulting in an unequal distribution of the work load, inefficiency and controversy. The Petitioner is supported in this contention by the practice in other circuits. In every other circuit in the State of Florida all cases of every category are divided among the Judges equally on a basis of comity and courtesy.

That this system of administration by self-appointment and subjective consideration has proven itself to be unworkable and a source of controversy in this circuit can be demonstrated by the following facts and statements:

(a) On April 17, 1962 this Petitioner ordered the Clerk of the Circuit Court of Pinellas County to furnish him with a list of appeals pending before the Circuit Court in that county. The list was not received until April 25, 1962 and was a list which had been in existence since September 1961. On the same day the Petitioner received the list, the Presiding Judge dismissed thirty-five appeals which had been pending for more than twenty years including one which had been pending since 1913 and four which had been pending since 1914, etc. Since the date this Petitioner took an active interest in criminal appeals pending before this Court one hundred thirty-two appeals, fifty-two of which had been pending for more than twenty years, have been dismissed. Prior to this time all criminal appeals were assigned to the Presiding Judge (this is the system which is unworkable.) If this is in the best interest of the Court there must be some explanation why these appeals could be disposed of after an active interest by the Petitioner on April 17, 1962 and were not disposed of for the fifty preceeding years. It may well be that additional investigation will divulge that more than one hundred thirty-two cases weare delayed in their diposition.

This Court is required by Section 932.52 (14) Florida Statutes 1961 to set all appeals "for a speedy hearing" and to dispose of all such appeals as "speedily as possible." This Court is further required by the same Section to sound the Municipal Appeals Docket at least twice in each year and "all undisposed of appeals shall have a speedy disposition." Until the last sounding of the docket in

Pinellas County in May of this year (after April 17, 1962) the Municipal Appellate Docket has not been sounded and this Petitioner is advised that this is true at least as far back as 1952. This is profoundly unfortunate.

When criminal appeals are filed in this Court and they are not "speedily" disposed of, this Court is then used as an instrument of injustice for the simple reason that a person convicted of driving while intoxicated, bolita or moonshine violations, or others on the municipal leval can thwart the progress of justice simply by appealing to this Court. In these instances the offices of the Court are being misused. This Petitioner is not suggesting that this misuse is intentional but is suggesting that each Judge must share his responsibility for efficient administration of the Court or must share the disgrace from not doing so.

(b) On July 9, 1962 this Petitioner ordered the Clerk of the Circuit Court of Pinellas County to give this Petitioner a report on the current status of pending cases, a copy of the report received is attached hereto and made a part of this Petition. The report eloquently describes the situation. Some of the cases pending date as far back as 1912.

(c) The work of the circuit is not only unequally divided as to the category but it is unequally divided as to the quantity. According to the information furnished by the Clerk of this Court the Judges in St. Petersburg are carrying the heaviest load by far. For every one case assigned to the two Judges in Clearwater, there are three cases assigned to the Judges in St. Petersburg. Considering the number of Judges in St. Petersburg, four, and the number of Judges in Clearwater, two, handling civil matters, the ratio should be two to one not the existing three to one. This creates a disparity of 50 per cent which is unfair to the litigants and the people of St. Petersburg even if the Judges there are willing to carry the heavier load.

(d) Recently, the Presiding Judge of the circuit certified to the Supreme Court that the case load in this circuit was such that it was necessary to assign a Judge from another circuit to help with the case load in the Sixth Circuit because the Judges were overburdened. So, while a Judge from another circuit handled work of the Sixth Circuit, this Petitioner, at the same time, had a total of six and one-half free work days on his calendar not counting Saturdays. The lack of liaison and organization is such that this Petitioner was not notified or consulted about the need for outside assistance and came to know about the situation when he read it in the newspaper. This lack of liaison and the resulting lack of cooperation is the result of the system of "self-appointment" and this situation is also contributed to by the fact that the rule in this circuit is not to have regular conferences except in January of the even years and then not again until July of the odd years.

(e) As you know the law requires that the Petitioner reside in Pasco County but as you also know the work of the circuit demands that the Petitioner devote a majority of his time to the work of Pinellas County. This being the situation, the Petitioner requested the Presiding Judge to assign criminal matters in Pinellas County to him on one of the following basis:

(1) One-eighth of the criminal cases (since there are eight Judges) or,

(2) Any reasonable assignment which the Presiding Judge cared to make. This Petitioner offered to carry his present assignment plus any criminal case assignment so as not to interfere with the present schedule of any other Judge. To this request the Presiding Judge announced that *he* handled *all* of the criminal cases in Pinellas County and had for years and was going to in the future in spite of what the Petitioner thought ought to be.

The Presiding Judge then advised this Petitioner that, "You will try criminal cases in Pinellas County over my dead body."

As each of you know this Petitioner has been the principal proponent in urging the establishment of a set of Local Rules to govern the practice in this circuit. There is not another circuit even closely approaching the population of this circuit that does not have a working set of Local Rules. As each of you know, I was the only Judge of this circuit who specifically requested an opportunity to serve on the Rules Committee, and as you know, this courtesy has been persistently denied me by a Presiding Judge who felt that there was no need for such Rules.

It would seem with further moderation that a system which would support one Judge taking such an attitude with another Judge of equal authority and jurisdiction is a system which is certainly going to breed controversy and ill will. Of necessity, a request made by any Circuit Judge should be considered and disposed of by the Judges on its merits. There can be no question that a controvery among the Judges exists but to the knowledge of this Petitioner there has been no dissention or anything that would mar a completely cordial relationship between all of the Judges except that which is directly attributable to this concept of "self-appointment."

Section Three of the Rules submitted will require amendment if the numerical distribution of cases between the Judges in St. Petersburg and Clearwater is to be equalized, or by using some basis other than the present geographic system for dividing the cases. It may well be that the better system would be to divide the cases among the Judges county wide and allow the Judge to travel between Clearwater and St. Petersburg as necessity requires. In either event, Section Three, as

it is stated, is only a suggested form not a solution if the unequal numerical distribution problem is to be resolved.

The Supreme Court's Order dated July 25, 1962 clearly indicates that the philosophy of the majority of the Judges in this circuit on the question of the relative position of the individual Judge is misguided. Of twelve rules that were submitted by the majority of the Judges and dissented to by this Petitioner, three rules were stricken entirely and three modified in such a way that they did not infringe upon the authority or dignity of any individual Judge.

Rule One, as submitted by the majority of the Judges and which has otherwise been discussed in this regard was stricken entirely.

Rule Seven, as submitted to the Supreme Court by the Judges of this circuit read as follows:

> VII. JURY TRIALS—BY WHOM TO BE TRIED.
>
> Each civil jury trial shall be conducted by the Judge to whom the case has originally been assigned, subject to re-assignment by the chairman of the Civil Division in order to equalize the trial load and expedite the conclusion of cases.

The Supreme Court amended Rule Seven to read as follows:

> VII. JURY TRIALS—BY WHOM TO BE TRIED.
>
> Each civil jury trial shall be conducted by the judge to whom the case has originally been assigned.

This is obviously as it should be. Comity requires that between Courts of concurrent jurisdiction the Court first taking cognizance of a matter preempts the field. With the result that once a Court of competent jurisdiction takes jurisdiction of a matter, then no other Judge or Court may infringe upon such jurisdiction. This is the

comity which the Supreme Court referred to when addressing the Judges of this circuit in the previous Order.

Rule Ten, which was submitted by the majority of the Judges of this circuit, read as follows:

> X. MINIMUM TIME FOR VACATING HOME IN DIVORCE AND SEPARATION CASES.
>
> A minimum of 24 hours shall be set in order to vacate in separate maintenance and divorce cases and the respondent shall be afforded an opportunity to apply to the court for relief from such order; and assignment of time for such hearing shall have priority.

This Rule attempted to restrict the discretion which is afforded to each individual Judge of this circuit. The Supreme Court struck this Rule in its entirety.

Rule Twelve, as submitted by the majority of the Judges of this circuit, read as follows:

> XII. BUDGET.
>
> Budget and purchases shall be handled by a resident Judge of Clearwater and a resident Judge of St. Petersburg.

This Rule attempted to take the authority from the individual Judges to handle the budget for their Court. Each individual Judge has this prerogative and it should not be taken away. The Supreme Court struck this Rule in its entirety.

Rule One, which was submitted by the Judges of this circuit has otherwise been discussed and will not be treated again in this regard other than to say the Supreme Court's striking Rule One is consistent with its treatment of Rules Seven, Ten and Twelve.

The purpose of referring to the treatment given submitted Rules by the Supreme Court is to demonstrate that any effort to concentrate power and authority in any individual Judge or committee of Judges under his control is inconsistent with the law and the nature of our judicial system. It is necessary that the authority afforded to each individual Judge be zealously guarded or else the individual Judge upon whom the entire system depends will be deprived of his judicial freedom and dignity which are indispensable. It is upon these considerations and the others considerations that have been referred to in this Petition that Petitioner urges the adoption of Rules that guarantee the authority and dignity of each individual Judge and defend against any arbitrary exercise of power that will interfere.

That it is necessary for the Judges of this circuit to pass a Rule which is consistent with custom and fair to each Judge of this circuit is most cogently demonstrated by the unfortunate necessity that caused the Supreme Court in its Order dated Monday, May 21, 1962 to remind the Judges of this circuit that,

> "Customarily throughout the state such assignments are made to divisions of Judges of multiple Judge circuits and they are made regularly on the basis of comity and courtesy in the interest of the orderly and efficient administration of justice."

The mere fact that we must be reminded to conduct our affairs on a basis of comity and courtesy should be more than enough to galvanize us into action toward such a system for this circuit.

It is with deep regret that this Petition is prepared and submitted. The situation leaves no alternative. This Petitioner's request for a conference of the Judges of this circuit has been denied. There must be either the arbitrary authority or an effort to create an atmosphere of fairness in which the Judges of this circuit can work in dignity.

It has been suggested that we further delay the consideration of the issues here raised. This Petitioner votes now unalterably for a system of fairness and comity which protects the dignity of each Judge of this circuit and votes against any system of "self-appointment".

There is no need for further controversy. If the Rules here submitted are undesirable, then each Judge should be able to give logical reasons for his objection and make counter recommendations consistent with custom and that which has been dictated by the Supreme Court of Florida to the Judges of this circuit directly and guided by the Rules on the same subject which have been approved by the Supreme Court in the past. (The Rules that are here submitted are either restatements or generally patterned after approved Rules that are in existence in other circuits in this state)

This Petitioner takes no pride in authorship and welcomes any amendment to the Rules here submitted and further offers his support to any Rules which his brother Judges will submit which are dedicated to a recognition of the dignity of each of the Judges in this circuit and effect an equal distribution of the work on a basis of fair consideration for each Judge.

Since the Supreme Court rejected your "Rule I", and amended your Rule VII, you can no longer logically denounce this Petitioner's position as being ill founded in spite of the seven to one vote. The Supreme Court's ruling clearly indicates the merits of Petitioner's position.

In this same vein, you do this Petitioner and yourselves an injustice if you attemt to categorize this question merely as an argument between the Presiding Judge of this circuit and this Petitioner. The personalities involved are not the issue. The issue is the equal

and fair distribution of this circuit and on a basis of courtesy and comity. If each of you resolve this issue objectively and adopt a Rule of the type suggested you need not be concerned about the relationship of this Petitioner and the Presiding Judge. The Presiding Judge and this Petitioner have consistently enjoyed a cordial relationship and will continue to do so if this matter is resolved in a businesslike manner without dilatory avoidance. This Petitioner believes sincerely that the Presiding Judge has done what he thinks is right as has this Petitioner but it is the issues, not the personalities, that demand attention.

Certainly, the pressure to resolve this conflict quickly, fairly and objectively should be unbearable. What a sorry spectacle is presented to the public when the dispensers of justice cannot resolve their own matters of administration with courtesy and objectivity.

DATED this 6th day of September, A.D. 1962.

Respectfully submitted,
RICHARD KELLY
Circuit Judge

ORDER

It appearing to me, as the Presiding Circuit Judge of the Sixth Judicial Circuit of the State of Florida, in order to have uniform, orderly, efficient and speedy administration of the criminal laws of the County of Pinellas; and said work being of a personalized character, and it having been recognized as a practice of this Circuit for many years that the criminal laws of Pinellas County should be administered by one judge insofar as possible in order to effectuate the desired uniform, orderly and efficient administration of the criminal laws,

IT IS THEREFORE ORDERED that all criminal actions or criminal matters involving the charging, arraignment, trial, sentencing or other disposition of criminal matters are hereby assigned to John U. Bird, Circuit Judge of said Circuit, and the Sheriff of Pinellas

County and the Clerk of the Circuit Court of Pinellas County, and their respective deputies, assistants and employees shall render such assistance as may be requisite for the administration of the criminal laws before the said judge, and are hereby prohibited from producing before any other Circuit Judge of Pinellas County for arraignment, trial, sentencing or other disposition, including but not restricted to writs of habeas corpus, any person or persons charged with any criminal offense within the jurisdiction of the Circuit Court, except upon the special order of the said Presiding Judge; and the State Attorney, his Assistants, associates and employees are hereby excused from presenting any person for arraignment, prosecution, trial, sentencing or other disposition, or from persenting any criminal matter pending in the Circuit Court of the Sixth Judicial Circuit of Pinellas County, except the judge designated as aforesaid.

DONE AND ORDERED this 13th day of December, A.D. 1961, at Clearwater, Pinellas County, Florida.

JOHN U. BIRD,
Presiding Judge,
Sixth Judicial Circuit.

RE: TRIAL OF FELONY CASES IN PINELLAS COUNTY

Upon consideration of my Order of December 13th, 1961, as Presiding Judge of the Sixth Judicial Circuit of Florida, recorded in Official Record Book 1314 at page 120, Instrument No. 897947 A, filed December 14th, 1961, relating to assignent of felony cases in Pinellas County;

IT IS NOW ORDERED that said Order be amended by deleting there from the phrase "Including but not restricted to Writs of Habeas Corpus" and substituting therefor the following:

"This Order and assignment shall not preclude any Circuit Judge from issuing any writ of habeas corpus. If any such writ is issued for release of any person charged, or attempted to be charged, or held for any felony, said writ, when possible, should, in the interest of the orderly administration of law and the dignity of the Court, be made returnable before the Judge assigned to the trial of the case."

Said Order of December 13th, 1961, in all other respects shall remain in full force and effect.

DONE AND ORDERED at Chambers, Clearwater, Pinellas County, Florida, this the 28th day of December A. D. 1961.

s/ John U. Bird
JOHN U. BIRD
Presiding Judge of the Sixth
Judicial Circuit

PROPOSED RULES OF PRACTICE FOR THE CIRCUIT COURT OF PINELLAS COUNTY SUBMITTED TO SUPREME COURT FOR APPROVAL JULY 5, 1962, HAVE BEEN CONSIDERED BY THE SUPREME COURT AND HAVE BEEN APPROVED IN PART AND AMENDED IN PART AS FOLLOWS:

I. DIVISIONS OF THE COURT.

Stricken.

II. EX PARTE HOURS.

Ex parte hours shall be from 1:30 p.m. to 2:00 p.m., of each day, at which time only non-controversial matters shall be considered.

III. HEARING ON EX PARTE MATTERS.

Any judge may hear ex parte matters involving free-dealership, removal of disability of non-age, and

change of name, regardless of the judge to whom assigned. Whether change of name proceeding shall require testimony and attendance of court reporter is discretionary with the judge presiding.

IV. GENERAL MASTERS.

There shall be three General Masters in Chancery to be appointed by a majority of the judges, two of whom shall serve in St. Petersburg and one in Clearwater.

V. DISCOVERY DEPOSITIONS AND PHYSICAL EXAMINATIONS.

All discovery matters, including written interrogatories and answers thereto, and physical examinations shall be concluded in advance of the pre-trial conference. Failure to comply with any one of these provisions shall cause the suit to be continued for the term, absent good cause.

VI. RULE NISI AND EXTRAORDINARY WRITS.

Any judge may issue a rule nisi or any extraordinary writ but the same shall be made returnable to the judge to whom the case is assigned. The issuing judge shall have prepared for distribution among counsel copies corresponding in number with the defendants or respondents.

When a case is submitted to a judge other than the one to whom assigned, the attorney so presenting the same shall verify by certificate as follows: "That the case, or the question presented, or the drafted form of order or decree requested, has not been previously submitted to any other judge."

VII. JURY TRIALS—BY WHOM TO BE TRIED.

Each civil jury trial shall be conducted by the judge to whom the case has originally been assigned.

VIII. COMPANION CASES.

An Attorney representing a party involved in a companion case shall forthwith advise the judge to which either of such cases is assigned. The said judge shall thereupon re-assign all such companion cases to the judge to whom has been assigned the case bearing the lowest docket number. The Clerk shall make appropriate notations on the file cover and the progress docket of such reassigned case or cases and thereafter all such companion cases shall be heard, tried and determined by the judge having the case bearing the lowest docket number.

IX. ATTORNEY NOT TO PREPARE PAPERS FOR OPPOSITE PARTY.

No attorney for either party shall prepare or assist in preparing on behalf of the opposite party any pleading to be filed in a proceeding for divorce, separate maintenance or annulment of marriage. A violation of this rule shall be ground for dismissal of the proceeding or other appropriate action by the court, sua sponte.

X. MINIMUM TIME FOR VACATING HOME IN DIVORCE AND SEPARATION CASES.

Stricken.

XI. PROCEEDINGS TO VACATE, ENFORCE, OR MODIFY JUDGEMENTS OR DECREES.

All applications, motions, and proceedings for the enforcement, modification, or vacation of any final judgment or final decree, heretofore or hereafter entered, shall be assigned to, heard and determined by the judge who signed the final decree or his successor in office.

XII. BUDGET.

Stricken.

Approved as amended
July 25, 1962.
(SEAL)
/s/ Guyte P. McCord
CLERK SUPREME COURT OF FLORIDA.

PINELLAS COUNTY

INTER-OFFICE COMMUNICATION

TO: Hon. Richard Kelly July 9, 1962
FROM: Mr. Alford Gordan

Pursuant to your request that you be advised of the approximate number of cases pending in the chancery and law sides of the Circuit, pleased be advised that in order to prepare a listing of all pending cases that it would entail a tremendous amount of work for this information to be listed and a long period of time. However, such a report was prepared in December of 1957 for the Florida Judicial Council and there were at that time approximately 4,500 cases then pending on the chancery and law sides of the Circuit Court. Undoubtedly this number has increased since that time and I would estimate that probably less than 10% of the ones then pending have been disposed of.
cc: Mr. Avery W. Gilkerson

PROPOSED RULES OF PRACTICE FOR THE CIRCUIT COURT OF PINELLAS COUNTY, FLORIDA

I. DIVISIONS OF THE COURT.

There shall be a Criminal Division and a Civil Division of the Court. Each such division shall have a chairman to be appointed by the presiding judge, with power of self-appointment.

II. EX PARTE HOURS.

Ex parte hours shall be from 1:30 p.m. to 2:00 p.m., of each day, at which time only non-controversial matters shall be considered.

III. HEARING ON EX PARTE MATTERS.

Any judge may hear ex parte matters involving free-dealership, removal of disability of non-age, and

change of name, regardless of the judge to whom assigned. Whether change of name proceeding shall require testimony and attendance of court reporter is discretionary with the judge presiding.

IV. GENERAL MASTERS.

There shall be three General Masters in Chancery to be appointed by a majority of the judges, two of whom shall serve in St. Petersburg and one in Clearwater.

V. DISCOVERY DEPOSITIONS AND PHYSICAL EXAMINATIONS.

All discovery matters, including written interrogatories and answers thereto, and physical examinations shall be concluded in advance of the pre-trial conference. Failure to comply with any one of these provisions shall cause the suit to be continued for the term, absent good cause.

VI. RULE NISI AND EXTRAORDINARY WRITS.

Any judge may issue rule nisi or any extraordinary writ but the same shall be made returnable to the judge to whom the case is assigned. The issuing judge shall certify a copy thereof upon which the executive officer shall make his return; and in addition thereto a copy or copies corresponding in number with the defendants or respondents. The certification shall be substantially in the following language: "I HEREBY CERTIFY that the within is a true copy of the original on file in the Clerk's office." Under no circumstance shall the original document be delivered to the executive officer.

When a case is submitted to a judge other than the one to whom assigned, the attorney so presenting the same shall verify by certificate as follows: "That the case, on the question presented, or the drafted form of order or decree requested, has not been previously submitted to any other judge."

VII. JURY TRIALS—BY WHOM TO BE TRIED.

Each civil jury trial shall be conducted by the judge to whom the case has originally been assigned, subject to reassignment by the chairman of the Civil Division in order to equalize the trial load and expedite the conclusion of cases.

VIII. COMPANION CASES.

When two or more cases are pending in this court which might appropriately be tried together, but which are assigned to different judges, the judge holding the lowest docket number shall try the cases and the other judge or judges shall assign accordingly. The clerk shall make appropriate notations, reflecting the judge before whom such cases shall be heard and determined.

IX. ATTORNEY NOT TO PREPARE PAPERS FOR OPPOSITE PARTY.

No attorney for either party shall prepare or assist in preparing on behalf of the opposite party any pleading to be filed in a proceeding for divorce, separate maintenance or annulment of marriage. A violation of this rule shall be ground for dismissal of the proceeding or other appropriate action by the court, sua sponte.

X. MINIMUM TIME FOR VACATING HOME IN DIVORCE AND SEPARATION CASES.

A minimum of 24 hours shall be set in orders to vacate in separate maintenance and divorce cases and the respondent shall be afforded an opportunity to apply to the court for relief from such order; and assignment of time for such hearing shall have priority.

XI. PROCEEDINGS TO VACATE, ENFORCE, OR MODIFY JUDGMENTS OR DECREES.

All applications, motions, and proceedings for the enforcement, modification, or vacation of any final judgment or final decree, heretofore or hereafter entered, shall be assigned to, heard and determined by the judge who signed the final decree or his successor in office.

XII. BUDGET.

Budget and purchases shall be handled by a resident judge of Clearwater and a resident judge of St. Petersburg.

Respectfully submitted,
JOHN U. BIRD
Presiding Judge
C. RICHARD LEAVENGOOD
T. FRANK HOBSON, JR.
C. M. KIRSINGER
CHARLES M. PHILLIPS, JR.
ORVIL L. DAYTON
THOMAS J. COLLINS

A TRUE COPY

Signed original
filed with Clerk or
Chief Justice
July 3, 1962

PRESIDING JUDGE
SIXTH JUDICIAL CIRCUIT

The undersigned Judge of the above entitled Court disapproves of the foregoing rules in their entirety, however, does approve of certain of the individual rules contained therein. A more formal disapproval will be filed.

RICHARD KELLY
Circuit Judge

PROPOSED RULES FOR THE INTERNAL GOVERNMENT OF THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF FLORIDA

In order to establish an orderly procedure and to establish an equitable division of the work of the Court based on comity and courtesy, and to expedite the business of the Court, the following Rules for the Internal Government of the Circuit Court for the Sixth Judicial Circuit of Florida are adopted and promulgated and shall become effective as of the date of the approval of the same by the Supreme Court of Florida.

SECTION I. DIVISIONS OF COURT

There shall be as many divisions of this Court as there are Judges authorized for said Circuit. Each of said Divisions shall be presided over by a single Judge assigned as follows:

Division A—Honorable John U. Bird
Division B—Honorable Orvil L. Dayton, Jr.
Division C—Honorable C. Richard Leavengood
Division D—Honorable Clyde M. Kissinger
Division E—Honorable T. Frank Hobson, Jr.
Division F—Honorable Thomas J. Collins
Division G—Honorable Richard Kelly
Division H—Honorable Charles M. Phillips, Jr.

If an additional Judge or Judges for this Circuit, in addition to the aforesaid eight, be appointed or elected, such additional Judge or Judges, in the order in which they are appointed or elected, shall be assigned to Divisions of this Court to be designated I, etc., and the successor of the above-named Judges and the successor of any additional Judge hereafter appointed or elected shall be automatically assigned to preside over the Division to which his predecessor was assigned.

SECTION II. CONFERENCE OF JUDGES

A conference of the Circuit Judges of this Circuit will be held at 9:00 A.M., on the first Friday of every month hereafter, or at such time as agreed upon by the Judges then present in the Circuit, or at any other time upon call of the Presiding Judge. Conferences will be held alternately in Chambers at St. Petersburg and Clearwater.

SECTION III. DIVISION OF CASES

The work of the Circuit Court of this Circuit shall be divided in such a way as to establish an equitable distribution of the case load among the Judges.

For the purposes of allocating civil matters within the jurisdiction of this Court in Pinellas County for determination in St. Petersburg and Clearwater respectively, Pinellas County will be divided into a northern and southern section by extending the southern municipal boundary of Largo, Florida, east and west across the county.

All civil matters within the jurisdiction of this Court which are to be heard in St. Petersburg shall be apportioned among Divisions A, B, G, and H, as follows:

Division C—25%	Division E—25%
Division D—25%	Division F—25%

All civil matters within the jurisdiction of this Court which are to be heard in Clearwater shall be apportioned among Divisions A, B, G, and H, as follows:

Division A—12%	Division G—25%
Division B—13%	Division H—50%

Assignments apportioned in this manner will be made by the Clerk of the Court according to an automatic schedule.

Said automatic schedules of assignment heretofore referred to shall be from time to time prepared and filed by the Court with the Clerk of the Circuit Court of Pinellas County. Said Clerk shall assign each case when filed to one of the Divisoins of this Court in accordance with said automatic schedules of assignment, and shall designate on the file cover, the complaint, and on the progress docket the Division to which such case is assigned and, thereafter, each case so assigned to a Division shall be heard, tried and determined by the Judge presiding over such Division and by no other Judge. The automatic schedules furnished the Clerk of the Circuit Court and their contents shall be kept secret and under no circumstances divulged.

SECTION IV. RE-ASSIGNMENT WHEN JUDGE DISQUALIFIED

When a Judge of any Division to which a case has been assigned is for any reason disqualified in said cause, then upon the entry of this order of disqualification the said cause shall be re-assigned by the Clerk to the next lower alphabetical Division of this Court if there is one, otherwise, to Division A.

SECTION V. TRANSFER OF CASES

All matters within the jurisdiction of this Court may be transferred from one Division to another provided the presiding Judge of the receiving Division and the presiding Judge of the transferring Division agree to such transferance.

SECTION VI. APPEAL CASES

The Clerk shall assign all appeals from lower courts, except de novo appeals, to the Divisions of this Court,

apportioning such assignments on the same basis as civil matters and using the appropriate automatic schedule of assignment; and thereafter, such cases so assigned pursuant to this Section shall be submitted to, argued before the determined by the Judge presiding over the Division to which such appeals are assigned.

SECTION VII. COMPANION CASES

An Attorney representing a party involved in a companion case shall forthwith advise the Judge of the Division to which either of such cases is assigned. The said Judge shall thereupon re-assign all such companion cases to the Division to which has been assigned the case bearing the lowest docket number. The Clerk shall make appropriate notations on the file cover and the progress docket of such re-assigned case or cases and thereafter all such companion cases shall be heard, tried and determined by the Judge of that Division.

SECTION VIII. PRESIDING JUDGE TO ASSIGN CRIMINAL TRIAL WORK, INCLUDING DE NOVO APPEALS.

The Presiding Judge of this Circuit shall allocate the criminal work in Pinellas County within the jurisdiction of this Court, including de novo appeals among Divisions A, B, G, and H, by making assignment of criminal trial work, including de novo appeal, to each Division so that each will carry as nearly as possible an equal share of the criminal trials.

The arraignments of all defendants in cases pending in Pinellas County will be assigned to Division A, B, G, and H, in rotation, and the Presiding Judge of this Circuit shall notify the judges and the Clerk of the schedule of rotation one year in advance. Such schedule of arraignments is to be kept secret and under no circumstances divulged.

All sentences will be imposed by the Presiding Judge of the Division before which the defendant was tried or before which the plea of guilty was received.

SECTION IX. PRIORITY OF HEARING

In the event an attorney has been set down for hearing before more than one Division for the same time, the case in which the notice of hearing was first given shall take priority over all other notices and hearings; provided, however, that jury trials shall be given priority, with criminal trials given first priority.

SECTION X. REMOVAL OF COURT FILE

(a) The respective Clerks of this Court will not permit the removal of the original court file from his office until the expiration of five full days after the date of filing complaint except upon order of the Court, unless a showing is made to the Clerk that it is necessary to present the file to a Judge upon emergency application for extraordinary relief.

(b) No court file shall be removed from the Clerk's office by any person, other than the attorneys of record, master or special examiner in the case, or guardian ad litem, without written leave of the Court, and no court file shall be taken outside of this circuit without written leave of the Court.

(c) Everyone removing files from the Clerk's office shall leave with the Clerk his receipt therefor.

(d) All court files shall be returned to the Clerk's office within ten days from the withdrawal of same, unless further time be granted in writing. Judges and Masters may retain files until their duties as such are completed and no longer needed.

(e) Failure to return files will be grounds for the denial of withdrawal privileges. The cost of re-establishing lost files will be assessed against the party whose receipt the Clerk keeps for such files.

SECTION XI. DETERMINE DIVISION BEFORE GIVING NOTICE

To avoid confusion, loss of time and delay, it is incumbent upon the attorneys to determine the Division to which a case has been assigned prior to reserving time and noticing the same for hearing.

COMPARISON CHART
CIRCUIT COURT CASES DISPOSED OF:

	Pasco	Pinellas	Hillsborough
1963	1828	6559	8330
1964	561	6799	9463
1965	783	5422	9734
1966	695	6080	7880

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

TRANSCRIPT OF CHARGE TO GRAND JURY

A Grand Jury of eighteen men and women having been duly impaneled and sworn in open Court in Clearwater, Pinellas County, Florida, the 30th day of August, A.D., 1965, the Honorable B. J. Driver, Judge of said Court, charged the Grand Jury as follows, to-wit:

APPEARANCES:

MR. CLAIR A. DAVIS,
State Attorney
Sixth Judicial Circuit of Florida;
MESSRS. ALLEN P. ALLWEISS,
and MR. RICHARD J. MENSH,
Assistant State Attorneys
Sixth Judicial Circuit of Florida.

THE COURT: Mrs. Spoth, Mrs. Milcinsky and gentlemen, you eighteen people constitute the Grand

Jury for this Court, Circuit Court of Pinellas County, Florida, for this term, the spring term. Your duties begin today and they will end on the sixth day of December, 1965. That doesn't mean that you are going to be required to work from now until then. There are matters requiring attention of the Grand Jury today. I am advised that you will probably function today and tomorrow, maybe a little bit on the following day, Wednesday. You will then be recessed subject to being recalled at a later date should you be required. You will be given ample opportunity to prepare yourselves to come back; in other words, give you sufficient notice that you will not be called on without an opportunity to prepare your affairs. You will be allowed to go home at night; you will set your own hours that you wish to labor.

It is the duty of the Court to instruct you before you begin your labors. It is essential that you have an understanding of the enormous power of the Grand Jury and of the great responsibility which it has.

The duties of the Grand Jury are those of an independent investigative body. The Grand Jury does not try cases. It inquires into complaints and charges of crime. You are responsible to no person nor to no body except this Court as required by law.

The Grand Jury is the most powerful body known to Government. It is also, of course, one of the most responsible. There is no greater power for good and deterrent to evil than the Grand Jury. Those who are inclined to commit crimes are deterred because of the fact that they may have the eye of the Grand Jury placed upon them. It is also a protection to the citizenry of the State knowing that they have the Grand Jury looking after their interests. No body and no group exercises a more important duty, a more indispensable function of Government than does the Grand Jury.

The Grand Jury is an ancient institution. It has a known history of over seven hundred years. History has proved its worth beyond every doubt.

The oath which you have had administered to you today can be traced back to 997 when about the same oath was administered by a Dane known as Ethelbert The Unready when he charged the equivalent of a Grand Jury in Denmark: That is, to shield no man who has committed a crime, nor to allow to go free any guilty man.

I charge you that the Grand Jury has two spheres of operation: Those pertaining to violation of the criminal law and the right to investigate those matters which are considered and termed to be of a civil nature.

First, with reference to the criminal phase of your activities, it is the duty of the Grand Jury to investigate charges of crime which have been brought to its attention. It is not the duty of the Grand Jury, however, to try these cases. That is the duty of the petit jury. Yours is simply to inquire and determine if crimes have been committed and if they are brought to your attention. It is your duty and your sole duty to ascertain if probable cause exists that a crime has been committed and if the person accused probably committed that crime. And, if the evidence is sufficient to constitute proper cause that the crime has been committed by the accused person, then it is the duty of the Grand Jury to find what is known as a true bill, which, when it is properly returned in this Court, then becomes an indictment upon which the accused may be tried.

Probable cause, which must be shown to your satisfaction before you should vote to return a true bill, has been defined as a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a particular person is guilty of a particular crime. I charge you that mere suspicion as such would not constitute probable cause.

I remind you that, as an aid and assistance to you, the State Attorney is required by law to be the legal counsel to the Grand Jury. He will submit to you those matters which have been called to his attention and which he thinks worthy of the consideration of the Grand Jury. You may rely upon the State Attorney as your legal advisor.

In weighing and considering the issue of probable cause, however, I would remind you that you will hear only one side of it, one side of the cause. You will not hear the defendant's side of it. For that reason, you should scrutinize carefully those matters brought before you to make sure that you are not bringing back indictments, true bills, based upon mere suspicion, surmise, or speculation. It is of no force and effect, can serve no good purpose, to return true bills based upon evidence which is insufficient to sustain the proof necessary to justify a conviction of the accused. However, when you are satisfied that probable cause exists, it is your sworn duty to cause the accused person to be indicted. Likewise, when indictment is not justified, it is your sworn duty to absolve or clear the accused person by returning a no true bill.

You have the authority to investigate any crime. I suggest and advise, though I do not instruct you, that you should first concern yourselves primarily with the investigation of those matters that are known as capital cases. Under the Constitution the only manner in which a person accused of a crime which carries with it the death penalty; that is, a capital case, is upon Grand Jury indictment. These are the ones you should concern yourselves with primarily, and such other matters as you deem appropriate to your consideration under the law as I am giving it to you and as it may be brought to your attention by the State Attorney.

Now, with reference to the several matters that may be inquired into by you, the Grand Jury is not limited to investigation of criminal cases. It may and has the plenary power to investigate several matters,

to invetigate officials of the County, whether the investigation involves charges of criminal activities, misfeasance in office, nonfeasance or malfeasance. It is your right and your duty, and you have the power, to inquire whether any official of the County or the State is acting in a competent manner or is being lax in the performance of his or her duties as are imposed upon them by the law. In general, you may not only investigate every offense which affects the morals, health, sanitation and general welfare of the County, but may and should inquire into matters of Governmental administration, including County institutions, buildings, offices and officers, and make it your permanent concern, their psysical, sanitary and general condition if you deem such an investigation to be required by your oath and under your duty as the Grand Jury of this County.

Let me caution you, however, that a Grand Jury investigation must not be made a tool of any designing group or block in order to embarrass or suppress or harass any individual, or to pry into any individual or groups personal affairs. Promiscuous indictments or presentments or reports, grounded on street rumors or common gossip will not be permitted by the Grand Jury. You should not indulge in any such.

A Grand Jury ought not to single out persons in civil or official positions for the purpose of censure or to impugn their motives by words or otherwise, or by innuendos, thereby holding them up to criticism or scorn unless there is a strong foundation for that criticism. It is improper and unlawful to present with words or censure or reprobation a public official or any other person by name without presenting him or her for indictment. In other words, you are not to utilize the strong powers vested in you except in those areas which the law allows. You may, however, give a fair, unbiased report of your findings as they pertain to negligence or incompetence on the part of any public official or officials who are responsible for any undesired condition you might find in any County institution.

Now, as to the procedure to be followed by the Grand Jury in its investigation, it will be the duty of the Court, and I shall perform this duty at the conclusion of these charges, to appoint one of your number as your foreman. He will be the Grand Jury foreman for the entire term of Court. Also, you will have a vice foreman. The duties of the foreman are to preside over the sessions of the Grand Jury, to administer oaths to the witnesses, and to keep a list of all witnesses. The vice foreman shall perform these functions in the absence or disability of the foreman himself. The clerk, who will be nominated by your number and appointed by the Court, shall keep the minutes of your proceedings in a book provided for that purpose. The State Attorney will advise you as to the mechanics and details of performing these functions. It is the duty of the foreman, and he will return to this Court a list under his hand of all the witnesses who have been sworn and testified before the Grand Jury. And the clerk, when the Grand Jury directs, shall deliver the minutes of your sessions to the State Attorney or his authorized assistant. As I told you, the State Attorney either in person or acting through his assistants, is the legal advisor of the Grand Jury on any matters that might come before it. Now, it is to your best interest as a Grand Jury to accept and consider in good faith the advice and counsel of your legal advisor, and to give careful consideration to what he instructs you as to your duties and as to your rights and as to the law as it may apply to those matters that come before you.

It is the duty of the Court; that is, myself or one of my colleagues, Judge Anderson, whoever might be on the bench at the time, to be available to help the Grand Jury if you should require it. If at any time you should require further instructions from the Court, then we will be available to give you those instructions. We are not allowed, however, to advise you what you must do or what you ought to do. That is your duty and at your sole discretion.

Every Grand Jury under the Constitution consists of not less than fifteen members nor more than eighteen members. At least fifteen members of the Jury must be present at all times, and the affirmative vote of not less than twelve of those present is necessary for the finding of any indictment, presentment or report. The Grand Jury can take no action whatever unless you have at least fifteen of your members present.

It is within the province of the Jury to recess from day to day and week to week and to meet the conditions which you may encounter in the performance of your duty. I remind you, however, that the terms of this Court are limited and the time within which the Grand Jury may work is limited. It is, therefore, important that you carry on and finish your labors as expeditiously as possible and in as short a time as it is compatible with those duties which you are called upon to perform.

Under the law, if the Grand Jury deems it necessary, they may have available to them the services of a Court Reporter. This is not necessary, and I strongly urge you to follow the advice and counsel of your legal advisor in determining whether or not you wish a Court Reporter present.

If necessary, you may have the services of a qualified interpreter of a foreign language, should you deem it necessary.

A Bailiff will be made available to you by the sheriff. He will be outside your jury room at all times and is to assist you in any fashion that you deem necessary.

Now, in the course of your investigation, should it occur that any member of the panel is related by blood or marriage to any person being investigated by the Grand Jury, that Grand Juror may excuse himself or he may be excused by the Court; that is, the Judge,

upon it being brought to our attention; or the jury itself, by a majority vote of its members, may excuse that particular Grand Juror from participating in the deliberations. In any event, should this occur, you should let the Court know about it immediately.

Now, I want to instruct you concerning the secrecy surrounding your deliberations and the independence of the Grand Jury. These two qualities, secrecy and independence, are indispensable to a successful and effective function of the Grand Jury. The Grand Jury could not operate without these two qualities. The independence of the Grand Jury has already been referred to previously by myself. It is responsible to no one, absolutely no one except this Court.

Now, the secrecy which I mentioned guarantees to the Grand Jury freedom from restraint and guarantees impartiality in its decision. No one—and let me emphasize that—absolutely no one can tell the Grand Jury what to do or what not to do so long as the Grand Jury acts within the law. Not even myself or one of my colleagues as the Judge of this Court can impugn your activities nor limit them in any way so long as you are acting within the law.

The Grand Jury may conduct investigations upon its own initiative or upon suggestion of the State Attorney. The law gives to the Grand Jury complete immunity for its official acts and to each member of it is granted immunity for those acts committed in the discharge of the duties cast upon the Grand Jury, unless, of course, a Grand Juror personally, that is, the individual Grand Juror, should conduct himself illegally or improperly and outside the scope of his duties as cast upon him by the law.

Now, while the Grand Jury is hearing testimony or otherwise receiving evidence of any nature, no person except the State Attorney or his assistant or the Court Reporter, if you should have him, and the Grand Jury itself and the person being questioned shall be in the Grand Jury room. Let me reiterate that. The only persons permitted in the room while you are conducting your investigations are the members of your own body, the State Attorney, the Court Reporter, if you have one, and the person being questioned. All others must remain outside of the room and outside the hearing of the Grand Jury.

Now, while you are deliberating; that is, when you find the time appropriate to make up your presentment, return your indictments, no person, absolutely no person, including the State Attorney or the Court Reporter, will be present. The only persons in the jury room at that time will be the jury itself, all others being excluded.

Secrecy and fidelity are required of every individual member of the Grand Jury, and I remind each of you that severe penalties may be imposed on any Grand Juror who violates his oath or these instructions. The law forbids outsiders from taking any part whatever in the deliberations of the Grand Jury; from trying to or exerting any unlawful or corrupt interference or from attempting to or actually interfering with the duties of the Grand Jury, or attempting to exert any influence upon the Jury or any member thereof; that is, to try to sway or persuade them to act in a given way contrary to their duties. If any person should seek out and try to talk to the Grand Jury about any matters which should come before it or that you feel is trying to influence you in any fashion, it is your duty, and I instruct you, to call that to my attention immediately so that I might deal with it appropriately.

I charge you that the Grand Jury functions as a whole. No member of the Grand Jury has any authority to act individually. You can only act as a body. And the fact that you are a member of the Grand Jury does not imbue you with any authority. You must act as a body, as an institution, and not as individual members. However, any member of the jury may receive complaints and should bring to the members of the body as a whole any complaint which it has or which has been brought to your attention so that the Grand Jury as a whole may conduct an investigation as to these complaints. Or you may present these matters to the attention of the State Attorney, who will then present them in the proper fashion to the body as a whole.

The law requires that if any member of the Grand Jury knows or has reason to believe that an indictable offense, triable in the County, has been committed, he shall declare such fact to his fellow jurors who shall investigate it.

Briefly I instruct you that the law says, and I am required mandatorily to instruct you, that the Grand Jury may investigate and ought to investigate any alleged offense or violation involving the child labor laws of this State. The Grand Jury also may investigate any complaint concerning the election laws and the administration of the County.

In conclusion, ladies and gentlemen, I want to call to your attention the oath that each of you has taken as a member of this panel. The oath is prescribed by law and contains in very simple terms the sworn obligation by which you are now bound and which you must obey in every respect. This oath contains no surplusage, no superfluous words. It means exactly what it says. It is worth repeating, and I repeat it to you. It is that you, as Grand Jurors for the body of Pinellas County, do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; the counsel of the State of Florida, your fellows and your own, you shall keep secret, unless required to disclose the same by some com-

petent Court. That portion of the oath referring to secrecy is most important and cannot be over-emphasized. I remind you and reiterate that you shall not under any circumstances discuss these matters, these things, matters, coming before the Grand Jury, unless authorized and ordered by some competent Court. Your vote shall never be known outside the jury room. The opinions expressed by you on any matters while in the jury room shall never be known outside that jury room, and the testimony given you by the witnesses within the confines of the Grand Jury room shall not be known, as I said, unless they are released by some order of some competent Court. This oath is binding upon you at all times while you are a member of this panel and will follow you after you are discharged as a Grand Juror. It is an oath that you cannot secure relief from.

The oath follows, in addition to what I have said, in these words: "You shall present no man for envy, hatred, or malice, neither shall you leave any man unpresented for love, fear, favor, affection, reward, or hope thereof, but you shall present things truly as they come to your knowledge, according to the best of your understanding. So help you God."

Like the Grand Jury itself, this oath is of ancient vintage and the instruction is the same as that administered to the Grand Jurors under the ancient common law of England and as administered to the Grand Jury, investigative body, of Denmark and Scandinavia. It is as nearly a perfect expression of fidelity and duty as can be promulgated by man. It contains the rules and high standards of fair and impartial duty and justice which ought to govern you in your service as a Grand Juror of this County and of the State of Florida. It is as appropriate today as it was when it was first pronounced seven hundred years ago.

Now, ladies and gentlemen, what I have given you, constitutes the general charges which are given to every Grand Jury as to its duty and as to the manner of conducting its work. These instructions are the instructions of the Court and you are to follow them.

The Court appoints Herman Hillard Dormany as foreman of this Grand Jury, and appoints Norman Frank Robbins as vice foreman. Ladies and gentlemen, when you retire to the jury room to begin your deliberations, you will select one of your number as clerk. You will nominate him and you will advise this Court of the name of that clerk, and his or her name will be spread upon the minutes as the clerk of this Grand Jury.

Mr. Clerk, here are the names. Mr. Bailiff, you will now escort the Grand Jury into its room to begin its deliberations. Ladies and gentlemen, when you have finished your labors and are prepared to make your presentment, the Court will be available to receive this.

The Court will now recess for five minutes, at which time it will reconvene for the trial of State versus Katz, Judge Anderson presiding.

STATE OF FLORIDA)
COUNTY OF PINELLAS)

I, James M. Swain, do certify that a Grand Jury, having been impaneled and sworn on the 30th day of August, A.D., 1965, in Clearwater, Pinellas County, Florida, was charged by the Honorable B. J. Driver; that I was authorized to and did report in shorthand the charge of said Court to the Grand Jury; and that the foregoing pages, numbered 1 to 17, inclusive, constitute a true and correct transcription of my said shorthand report.

Witness My Hand this 7th day of September, A.D., 1965, in St. Petersburg, Pinellas County, Florida.

James M. Swain
Official Court Reporter

EXHIBIT D
ACTUAL TRIAL SCHEDULE (1965 - 1967)

		Judges Used	Cases Set	Days Available	Days Used	Judges Required
Oct.	2	5	46	25	14	3
	9	6	38	30	11	3
	16	3	35	15	3	1
	23	3	18	15	1	1
	30	2	15	10	3	1
		19				9
Nov.	6	4	25	20	8	2
	13	5	50	25	12	3
	20	4	29	20	3	1
	27	3	17	15	3	1
		16				7
Dec.	4	4	29	20	9	2
	11	6	44	30	12	3
	18	2	12	10	3	1
	26	1	1	5	1	1
		13				7
Jan.	2	1	8	5	3	1
	8	4	35	20	16	(3)
	15	5	31	25	14	3
	22	3	24	15	6	2
		13				9
Feb.	5	4	32	20	15	3
	12	5	49	25	12	1
	19	2	9	10	3	1
	26	2	13	10	3	1
		13				8

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Appendix "B" have been furnished by United States mail, postage prepaid, to the Honorable William Hopkins, attorney for Respondent Florida Judicial Qualifications Commission, Supreme Court Building, Tallahassee, Florida 32302 and to the Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32302 this _____ day of December, 1970.

JOHN W. BOULT,
ESQUIRE of
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Post Office Box 1438
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In the

Supreme Court

of the

United States

Supreme Court, U.S.
FILED
JAN 27 1971
E. ROBERT SEAVER, CLERK

OCTOBER TERM, 1970

No. 1087

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE,

Petitioner,

vs.

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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BRADY REVIEW — 373-4253 — 377-5721

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE,

Petitioner,

vs.

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Respondent, FLORIDA JUDICIAL QUALIFICATIONS COMMISSION, accepts the introductory statements in the Petition including Petitioner's "Statement of the Case" as it is amplified by the statement contained in the Report of the Respondent to the Supreme Court of Florida (Petitioner's B. 11) and by the statement contained in the opinion of the Supreme Court of Florida. (Petitioner's A. 13)

The discussion contained in this Brief will be directed to the questions presented to this Court by the Petition and in that order.

I

Petitioner would have this Court consider as the sole basis of his reprimand the written Petition which he, as Circuit Judge and not as an individual, filed with the Clerk of the Sixth Judicial Circuit in Pinellas County, Florida, on April 5, 1968, addressed to The Judges of the Sixth Judicial Circuit. (Petitioner's A. 1) While this Petition contains statements certainly unbecoming a member of the Judiciary and directed toward other members of the same Judiciary, it is not this Petition alone which resulted in the charges and later reprimand of Petitioner. This Petition merely is the final, concrete and overt act of Petitioner culminating his unacceptable conduct and evidencing his attitude toward his fellow Judges, court attaches, and others, in considering himself above and beyond that which is expected of a member of the Judiciary. Contrary to the Petitioner's contention that he was reprimanded solely for his "activities" of the filing of the April 5, 1968 Petition, the Supreme Court of Florida indicated the extent of the evidence it considered in arriving at its conclusion and summarized it in its opinion (Petitioner's A. 17):

> "The evidence is replete with instances in which the judicial temperament of petitioner was lacking. Nineteen of the approximately twenty-one lawyers of Pasco County were willing to, and did, sign a petition for the impeachment of Judge Kelly; seven lawyers left Dade City in Pasco

> County because of Judge Kelly; many cases ordinarily filed in Pasco County were filed out of the county because of Judge Kelly; attorneys and court personnel were fearful of Judge Kelly; he was rude and inconsiderate of attorneys and court personnel. His erratic behavior culminated in the filing of the petition."

Although the Respondent considers the filing of the Petition itself an unorthodox procedure not necessarily countenanced by or falling within normal judicial conduct, in order for this Court to be fully apprised of the situation, it must consider the whole picture — the woven fabric of the circumstances, the actions of the Petitioner, and his relationship with others with whom he came in contact as a member of the Judiciary. A consideration of the evidence presented to the Respondent Commission will indicate the unorthodox and charged atmosphere of the Court over which the Petitioner presided, the complete disregard for the feelings of individuals employed in or appearing before that Court and the Petitioner's overriding concern with his own self-interest. The findings of the Respondent Commission as adopted by the Supreme Court of Florida should be considered in the light of the total picture surrounding the Petitioner and prevailing at the time of the filing of that Petition on April 5, 1968.

Respondent does not in any way question the right of a Judge to speak publicly for reform in judicial administration and, in fact, would consider it the duty of such an individual. However, such must be done within the framework of judicial procedures and the accepted methods of conduct leading to that end. As was reflected in this proceeding, the Petitioner was well acquainted with the "gen-

erally accepted methods" and the rules providing for the institution of change in judicial administration, since on other occasions in the past he had successfully argued his views in obtaining such reform and, therefore, knew of its workability. Without conceding the propriety of an attempt such as was made by the Petitioner, at any time, it would at least be somewhat more understandable had the Petitioner exhausted the established remedies authorized for proposed judicial reform unsuccessfully before attempting such action but, in view of his knowledge of the procedures, to callously disregard them in this manner is, in the opinion of the Respondent, inexcusable.

In *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.ed. 1295 (1945) (Frankfurter, J. concurring) it was stated that:

> " . . . (I)n a series of decisions which presented most sharply the constitutional extent of freedom of speech, this Court had held that the Constitution did not allow absolute freedom of expression —a freedom unrestricted by the duty to respect other needs fulfillment of which makes for the dignity and security of man. *Schenck v. United States*, 249 U.S. 47; *Frohwerk v. United States*, 249 U.S. 204; *Debs v. United States*, 249 U.S. 211."

This certainly is applicable to the argument presented here by the Petitioner concerning his right to freedom of speech and the action taken by the Supreme Court of Florida. Although unquestionably the ultimate bulwark of freedom in a democracy, the Judiciary is equally a delicate mechanism which must depend upon the respect and obe-

dience of the general populace to its pronouncements in order to effectively protect the rights of individuals, as well as, the rights of society. Courts, generally, are equipped with procedures to protect themselves against outsiders and have available to them whatever measures are necessary to insure the proper respect and require obedience to their mandates. However, when criticism comes from within, the Courts are powerless to protect themselves, particularly when such criticism comes from one who is generally popular with the electorate. The Petitioner's freedom of speech cannot be freedom from any responsibility whatsoever in its exercise.

Petitioner relies heavily on this Court's pronouncements in *Wood v. Georgia*, 370 U.S. 375, 82 S.Ct. 1364, 8 L.ed. 2d 569 (1962); *Craig v. Harney*, 31 U.S. 367, 67 S.Ct. 1249, 91 L.ed. 1546 (1946); *Pennekamp v. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.ed. 1295 (1945); *Bridges v. California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.ed. 192 (1941).

In the opinion of the Court in *Craig v. Harney*, supra, at page 373, referring to *Bridges v. California*, supra, and *Pennekamp v. Florida*, supra, the Court stated:

> "Neither those cases nor the present one raises questions concerning the full reach of the power of the state to protect the administration of justice by its Courts. The problem presented is only a narrow, albeit important, phase of that problem —*the power of a court promptly and without a jury trial to punish for contempt on cases pending before it and waiting disposition.*" (emphasis supplied)

In *Wood v. Georgia*, supra, this Court was also concerned with the Court's power of contempt. These cases establish the limitations of the Court's power to punish by contempt. Had the other judges of the Sixth Judicial Circuit or the Supreme Court of Florida attempted to "punish" the Petitioner through the use of the contempt power, these cases would certainly be applicable, but such is not the situation that is presented to this Court and the holdings of these cases certainly cannot be considered as controlling in this judicial disciplinary proceeding. Nor is it necessary that the Supreme Court of Florida find that the actions of the Petitioner create a clear and present danger of the disruption of the administration of justice as is required by the cases cited by the Petitioner.

Any consideration by this Court of this matter should not be concerned with Petitioner's right of freedom of speech or with the contents of his writings but actually whether the methods used by the Petitioner and the turmoil created by his actions are to be considered as conduct unbecoming a member of the Judiciary and contrary to the Canons of Judicial Ethics. As the Supreme Court of Florida so aptly stated,

> "He cannot avoid the resulting inquiry as to his motive and methods by invoking the right of freedom of speech in this disciplinary proceeding. We are not concerned with his right to speak, but whether his motive or method does violence to the Canons of Judicial Ethics." (Petitioner's A. 21)

Constitutional guarantees cannot be considered academically, theoretically or abstractly, but must be considered in the light of methods and motives used by the actor since the guarantees are applicable only to individ-

uals exercising them in given circumstances. No one may exercise an absolutely unrestricted right to criticize as this Court has consistently recognized. In circumstances such as these where Petitioner is the holder of a high judicial office, consideration must be given to the welfare of the public and its interest in the maintenance of a high degree of respect and regard by the public for its Judiciary. Of course, there can be no question of the public's right to know about possible defects in its judicial administration, however, due consideration must be given for the maintenance of the integrity of the system as a whole and the right of an individual within the system to criticize its administration must be tempered by the public interest in the maintenance of the integrity of the system. Although individual freedom of expression is a basic tenet of our system of government, so also must be the continued existence of the system itself.

Petitioner has consistently referred to the action taken by the Supreme Court of Florida and this Respondent as "punishment" in an apparent attempt to place a greater burden upon the Respondent and, consequently, upon the Court to find "guilt" in this proceeding. Proceedings such as these are not penal in nature in that they impose no punishment for an offense against the people. They are, in fact, remedial in that they allow the people to consider the qualifications of those serving in high positions of public trust and to retain in the Judiciary only those individuals who are qualified to serve in such position. No punishment is imposed but rather those legal consequences follow which are necessarily attached to the discipline or disqualification of a person holding judicial office. These matters must be considered in light of the situation which actually exists and not in the context which Petitioner would thrust upon these proceedings to suit his own end.

II

Petitioner also complains of a denial of procedural due process accorded him by the action of the Respondent Commission which was considered and approved by the Supreme Court of Florida. There is no complaint, however, that the Respondent failed to comply strictly with the provisions set forth in Article V of Section 17 A(3) of the Florida Constitution or of the Rules of the Florida Judicial Qualifications Commission published at 207 So.2d 443, nor is there any basis for such a complaint. In *Barsky v. Board of Regents of N. Y.*, 347 U.S. 442, 74 S.Ct. 650, 98 L.ed. 829, this Court stated:

> "It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there. It is a vital part of a state's police power. . . . It has established detailed procedures for investigations, hearings and reviews with ample opportunity for the accused practitioner to have his case thoroughly considered and reviewed."

Certainly it is equally elemental that a state has such broad power to establish and enforce standards of conduct within its judiciary since nothing could be more vital to the citizens of a state than the maintenance of a high degree of professional conduct within the judiciary.

Neither can there be any substance to the claim of the Petitioner that he has been denied adequate notice or opportunity to be heard since this matter was thoroughly and completely considered by the Respondent Commission with ample opportunity to the Petitioner to present what-

ever evidence he wished to present to the Commission for its consideration, the record fully and accurately transcribed and presented for review to the Supreme Court of Florida with the recommendation of the Respondent Commission. Petitioner, again, had a full opportunity to present argument in his behalf before the Supreme Court of Florida.

As Petitioner concedes at the conclusion of the Petition, "the development of modern machinery for inquiring into judicial conduct is a vital part of our contemporary legal history. Errant judicial conduct should be dealt with promptly." Respondent certainly agrees with this statement, however, it is equally vital that obstreperous individuals such as the Petitioner be thwarted in attempts to make shambles of any process which in any way sets standards of conduct with which they disagree. Even the processes of impeachment of judicial officers, depend upon a consideration of the acts of those members of the Judiciary by persons other than members of the Judiciary and, for that reason, it is imperative that the Judiciary have the right to protect itself from improper action by one of its own through such proceedings as these. However, if the disciplinary action which the Respondent Commission may take is restricted to the corrupt, senile or insane, there is little need for such a disciplinary body since other methods exist for the handling of such matters.

The people of Florida have expressly provided in their Constitution the basis for this procedure, followed and approved by the highest Court of the State of Florida — must this Court hold that such procedure as authorized by that constitutional provision collides with Petitioner's rights under the Constitution of the United States? Respondent thinks not.

As recently as March, 1969, this Court has declined to review a similar proceeding against the County Judge by the Court of the Judiciary of Oklahoma, Appellate Division, when that Judge complained of the denial of his basic constitutional right to a trial by jury. *Sharpe v. State ex rel, Oklahoma Bar Association*, 448 P. 2d 301, Cert. Denied, 394 U.S. 904, 89 S.Ct. 1011. Obviously, this attack against the proceedings strikingly similar to those in that case involve no more basic constitutional rights.

Proceedings such as those involved in this case are authorized and are being actively pursued in their duties and responsibilities in the following states: Alaska, California, Colorado, Delaware, Florida, Idaho, Illinois, Louisiana, Maryland, Michigan, Missouri, Nebraska, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah and the District of Columbia. Surely, procedures as widespread as this can involve no threat to nor denial of an individual's right of procedural due process and are in the best interests of our system of government.

CONCLUSION

The constitutional guarantees to the individual must be maintained and preserved in order for our system of government to survive and this Court has always been the unswerving defender of such rights, but it must equally recognize that such rights may be exercised only within our system of government in order for that system to be maintained and preserved. The right of the people of Florida to demand high standards of professional and judicial qualification and ethical conduct cannot be denied them by the Petitioner. Conversely, the people of Florida have not denied to the Petitioner any right which he may lawfully exercise.

For these reasons this Court should deny the Petition for Writ of Certiorari sought by the Petitioner.

Respectfully submitted,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition have been furnished by United States Mail, postage prepaid, to the Honorable John W. Boult, attorney for Petitioner, Fowler, White, Gillen, Humkey & Kinney, P.A., post office box 1438, Tampa, Florida, 33601 and to the Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32302, this day of January, 1971.

MARION E. SIBLEY, ESQUIRE, of
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Miami Beach, Florida 33139
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 1087

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE,
Petitioner,

vs.

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1087

THE HONORABLE RICHARD KELLY,
CIRCUIT JUDGE,
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vs.

FLORIDA JUDICIAL QUALIFICATIONS
COMMISSION.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari, entered on March 8, 1971, and (2) granting the Petition. As grounds for this motion, Petitioner states the following:

I. OBJECTIONABLE CONTENT OF RESPONDENT'S BRIEF IN OPPOSITION

In its Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida, the Respondent has extracted from the majority opinion of the Florida Supreme Court factual matters stated in that opinion which are so irrelevant to any issue properly before this Court or the Supreme Court of Florida as to be offensive to all fundamental concepts of fairness. (Respondent's Brief, pages 2-3). These factual matters relate to events occurring prior to Petitioner's re-election to office, and prior to the creation of the Commission.[1] The objection to the consideration of these matters was stated in detail in the Petition for Rehearing filed by this Petitioner following the decision of the Supreme Court of Florida. This Petition for Rehearing is set forth verbatim in Appendix "B" to our Petition for Writ of Certiorari herein. These objections were then, and are now, as follows (Appendix "B", pp. 35-40):

APPENDIX "B"

"1. This Court [Supreme Court of Florida] stated in its majority opinion (Slip Opinion, page 5) as follows.

> 'The evidence is replete with instances in which the judicial temperament of petitioner was lacking. Nineteen of the approximately twenty-one lawyers of Pasco County were willing to, and did, sign a petition for the impeachment of Judge Kelly; seven lawyers left Dade City in Pasco County because of Judge Kelly; many cases ordinarily filed in Pasco County were filed out of the county because of Judge

1. This basic fallacy in the majority opinion was succinctly noted by Chief Justice Ervin in his well-reasoned dissent. See Appendix "A", p. 37.

Kelly; attorneys and court personnel were fearful of Judge Kelly; he was rude and inconsiderate of attorneys and court personnel. His erratic behavior culminated in the filing of the petition.'

We respectfully submit that this portion of the Court's opinion may have resulted from the Court's oversight in two respects, each of profound importance.

(a) First, the record of the proceedings before the Commission in this cause reveals clearly that conduct and events occurring prior to the Petitioner's reelection to office were *not* to be considered by the Commission except as they might relate to the Petitioner's present mental competency. Early in the proceedings this was made clear by the Commission (TR. 504-507):

'MR. MASTERSON: May I go to the second point, sir? At the last meeting of the Commission I started to make an argument directed to whether or not the Commission could consider matters which had arisen prior to the formation of the Commission. The creation of the Commission. And the members of the Commission agreed with me, and it was unnecessary for me to argue that point. However, I don't believe anything is in the record at this point which discloses that.

I respectfully request the Commission to make that clear in the record. That the only time that the Commission will go behind an event which occurred prior to the formation of the Commission will be for the purpose of determining the mental competency of the Respondent, Judge Kelly.

CHAIRMAN: I believe you misconstrued or maybe misinterpreted the feeling of the Commission. It seems like the consensus of the Commission at its last meeting that the action was not tied, although dates are identical, that they are tied as

to the formation of the Commission, but were tied to the re-election of Judge Kelly as far as specific acts. That any matters and things pertaining to his mental condition, or which would bear upon his mental condition, occurring prior to his last election would be considered by the Commission, and that any evidence tending to bear upon that question would be received. But as far as specific acts of misconduct in office, assuming that he is sui juris, that those acts that were committed prior to his last election would not be considered by the Commission.

It will be the responsibility of the Commission to weed out this testimony, either on admissibility or upon final consideration of the matter.

If any member of the Commission feels that I haven't stated the consensus of the Commission, I wish they would make their desires known.

JUDGE BARKDULL: I think I am the one that raised the question before. It is my reply in the colloquy we had that it is not my understanding that this Commission sought to discipline Judge Kelly for any misconduct or alleged misconduct that may have occurred prior to his present term of office, but they would make an inquiry as to whether witnesses had an opportunity to observe and see and be familiar with Judge Kelly prior to that time in order to base an opinion as to his competency.

That it was not the purpose of this Commission to discipline Judge Kelly for anything that might have occurred incident, or facts that might have occurred prior to his present term of office.

MR. MASTERSON: I wanted to get that in the record.'

This matter was discussed later in the proceedings when, during Petitioner's examination by his

own counsel, the following exchange occurred (TR. 1357-1358):

'Q. Now, the House Managers conducted a rather thorough investigation, did they not, into your conduct as a trial Judge and as a Circuit Judge in preparation for your trial in the Senate?

A. If they missed anything I don't know what it was. They took an aerial photograph of my house.

Q. Well now, Judge, was there anything in the charges that were filed in the Senate—

CHAIRMAN: I notice that counsel is not objecting, but it would appear to me that this line of inquiry has been vigorously objected to by counsel and has been sustained by the Commission, unless it goes to his mental condition at that time. It doesn't have a thing to do with that subject matter.

MR. MASTERSON: The reason I am offering the testimony is to show that, first of all, there was precedent for filing of this Petition.

CHAIRMAN: Yes, sir.

MR. MASTERSON: And at a time when he was being exhaustively researched for some impropriety that this matter must have come to the attention of people investigating him, and they did not find it improper.

JUDGE RAWLS: He was being investigated for an entirely different offense than which he is being charged here. And the members of this body know it, and we have gone back and forth over that. I am just speaking as one member of the Commission. I don't see any reason for any further inquiry.'

And, of utmost significance in this regard, is the fact that the Commission expressly found that 'there is not sufficient evidence in this record to support a finding that Judge Kelly has a mental or emotional disability that seriously interferes with his conduct as a circuit judge'. (See: 'Report of the Judicial Qualifications Commission, page 7,' R. 110).

Thus, this Court in its majority opinion expressly predicates its approval of the Commission's recommendations upon evidence wholly unrelated to any charge or allegation as to which the Commission found the evidence sufficient or which survived the Commission's scrutiny and findings. In other words, this Court has approved the legality of the Commission's particular findings which were adverse to Petitioner upon the basis of evidence which was concededly unrelated to those charges.

In sum, the factual assertions stated in the above-quoted portion of this Court's opinion are based upon evidence which it was agreed would *not* be used to support any charge of which Petitioner was convicted by the Commission. Clearly, the Commission was correct in refusing to consider specific acts of alleged misconduct in office occurring prior to Petitioner's re-election for any purpose other than mental competence. The Commission correctly acknowledged that it was not its function to second-guess the electorate.[1]

Furthermore, it is of utmost importance that the very limited evidentiary purpose of pre-election conduct be studiously recognized and honored here. As shown in the above-quoted colloquy from the transcript (TR. 1357-1358), Petitioner was not allowed to explore pre-election events to establish the propriety of filing the Petition in the Circuit Court.

---

1. "No rule is better settled under our democratic theory than this; when one is re-elected or re-appointed to an office or position he is not subject to removal for offenses previously committed." *Rosenfelder* v. *Huttoe*, 24 So.2d 108, 110 (Fla. 1946).

We respectfully submit that the limitations established below regarding the purpose of this evidence were correct and should be binding here. Therefore, we submit that this Court should not consult or utilize that evidence in any way in reviewing or approving the charges of which Petitioner was convicted by the Commission.

(b) Further, the above-quoted portion of this Court's opinion states that Petitioner 'was rude and inconsiderate of attorneys and Court personnel.' This was the gravamen of the formal charge contained in Paragraph VIII which read as follows:

> 'Failing to be considerate of, and courteous to, counsel and others in attendance upon the court, contrary to Canons Nine and Ten of the Canons of Judicial Ethics, as adopted by the Supreme Court of Florida.'

Again, the Commission found the evidence as to this charge 'insufficient'. (See: 'Report of the Judicial Qualifications Commission, page 7,' R. 110). Thus, we respectfully submit that this Court overlooked the fact that the Commission, which heard and observed the witnesses, rejected this charge.

In sum, we respectfully submit that this Court has, inadvertently and through oversight, based its approval of the Commission's recommendations upon (1) evidence which is not legally relevant to any issue here and upon (2) an erroneous impression that the Commission had found Petitioner guilty of the 'rudeness' charge."

Thus, the Commission has further compounded a serious error in the factual predicate stated by the Florida Supreme Court in its majority opinion. This error is all the more painful in the light of the Respondent's comment here on page 7 of its brief that the proceedings of the Florida Judicial Qualifications Commission are "remedial in that they allow the people to consider the qualifi-

cations of those serving in high positions and to retain in the Judiciary only those individuals who are qualified to serve in such position." This observation is made in the face of the fact that the Commission relies upon here, and did rely upon in the Florida Supreme Court, events occurring before the "people" re-elected Petitioner to office. The Commission also ignores the fact that the prior impeachment effort ended in an acquittal without a defense being required.

II. NECESSITY OF PRESERVING THE RIGHT TO PUBLICLY PROMOTE JUDICIAL REFORMS

In recent weeks, and even in recent days, the citizens of the United States have had the privilege of reading about in the newspapers, watching on television, and observing in person, certain of the most respected and most influential of American jurists, including the Chief Justice of this Honorable Court and the Attorney General of the United States, espouse principles of judicial reform which go to the very heart of the administration of civil and criminal justice in this country. Indeed, even the President of the United States has, within the last week, urged the National Conference of Judges meeting in Williamsburg, Virginia, to adopt certain practices which would lead to more efficient administration of criminal justice. Particularly in view of this historical setting, which we believe reflects the mood and earnest desires of most Americans, it is incongruous that the dubious public reprimand of Judge Kelly should escape that intense scrutiny of this Court incident to an examination of the merits of Judge Kelly's case. This is of profound importance to the initiation of any meaningful improvement in judicial administration in this country. For, while the rhetoric of St. Louis and Williamsburg is valuable from the standpoint of education and inspiration, its practical effect necessarily depends on determined action by

judges who care at the grass roots level. And we must fervently ask: "Where will these judges be if they are subject to reprimand for 'rocking the boat'."

In the Petition filed by Judge Kelly with the Clerk of the Circuit Court, Judge Kelly made ten recommendations. Five of his recommendations related directly to speedy trials for accused prisoners and more efficient administration of the courts in his judicial circuit. (Appendix "A" to Petition for Writ of Certiorari, pages A-10 and A-11). Judge Kelly was reprimanded for publicly making these suggestions!

Let us consider for a moment the posture of any other circuit judge in the State of Florida. No matter how sincere his motives, no matter how meritorious his ideas, and no matter how significant his recommendations, will he nevertheless have substantial fears of public reprimand or even loss of position if he chooses to advise the public of his thoughts relating to the administration of justice? Regardless of the decision by this Court on the merits of this case, at least this Court should assure other judges in the State of Florida and throughout the country that the First Amendment protects judges as well as others who publicly suggest judicial reform.

Further, and with particular reference to the facts of the instant case, we submit that there is a disturbing attitude running through the Respondent's Brief in this cause.

Respondent refers to the right of the Judiciary to protect itself against "outsiders". (Respondent's Brief, p. 5). We must ask rhetorically: who, in a free society, can be considered to be an "outsider". The thrust of the Respondent's attitude toward this case is that Judge Kelly, by disclosing to the public his view of the defects in criminal administration and his suggested reforms, has breached

a set of mystic temple rules. The impression one gains from the Commission's comments here is that the courts of this Nation constitute one enormous Star Chamber with certain "secrets" related to basic questions of criminal administration which "secrets" cannot withstand the harsh glare of public scrutiny.

In essence, we again respectfully invite this Court's attention to the tone and content of the public utterances of Petitioner which form the basis of his being reprimanded. If the reprimand of a Judge for these reasons were constitutionally acceptable then the opportunity for effective judicial reform in the State of Florida would be virtually eliminated. This reform depends, in large measure, upon the right of the people to be advised of the shortcomings of the present system by the people who know—the Judges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition for Rehearing have been furnished by United States Mail to Marion E. Sibley, Esquire, of Sibley, Giblin, Levenson & Ward, 605 Lincoln Road Mall, Miami Beach, Florida 33139, Counsel for Respondent; and to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32302, on this 26th day of March, 1971.

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